Docket for 03-6821

(15)

No. 03-6821 Status: ARGUED
Title: David L. Nelson, Petitioner
v.
Donal Campbell, Commissioner, Alabama Department of Corrections, et al.
Docketed: October 9, 2003
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (03-15095-P)
Decision Date: October 8, 2003
Rehearing Denied: October 9, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 9 2003	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 10, 2003)
Oct 9 2003	Application (03A308) for a stay of execution, submitted to Justice Kennedy.
Oct 9 2003	Brief of respondents Campbell, Commissioner, Alabama Department of Corrections, et al. in opposition filed.
Oct 9 2003	Application (03A308) referred to the Court by Justice Kennedy.
Oct 9 2003	Application (03A308) granted by the Court.
Oct 20 2003	Reply of petitioner David L. Nelson filed.
Oct 30 2003	DISTRIBUTED for Conference of November 14, 2003.
Nov 6 2003	Supplemental brief of respondents Donal Campbell, Commissioner, Alabama Department of Corrections, et al. filed. (Distributed)
Nov 10 2003	Motion for leave to file amici brief filed by Alabama Physicians, Laurie Dill, et al.
Nov 13 2003	Supplemental brief of petitioner David L. Nelson filed. (Distributed)
Nov 21 2003	DISTRIBUTED for Conference of November 26, 2003.
Dec 1 2003	Motion for leave to file amici brief filed by Alabama Physicians, Laurie Dill, et al. GRANTED.
Dec 1 2003	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following Question: Whether a complaint brought under 42 U. S. C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U. S. C. Sec. 2254.
Dec 11 2003	Motion to appoint counsel filed by petitioner.
Dec 23 2003	Motion DISTRIBUTED for Conference of January 9, 2004.
Dec 23 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 22, 2004.
Jan 8 2004	Joint appendix filed.
Jan 12 2004	Motion to appoint counsel filed by petitioner GRANTED. Michael K. McIntyre, Esquire, of Atlanta, Georgia is appointed to serve as counsel for the petitioner in this case.
Jan 12 2004	SET FOR ARGUMENT Monday, March 29, 2004.
Jan 22 2004	Brief amici curiae of Laurie Dill, et al. filed.
Jan 22 2004	Brief of petitioner David L. Nelson filed.
Jan 29 2004	Extension of time within which to file respondents' brief on the merits to and including March 3, 2004.

Jan 30 2004	CIRCULATED.
Feb 4 2004	Record received from the U.S.D.C. for the Middle District of Alabama. (1 envelope)
Feb 24 2004	Record received from the U.S.C.A. 11th Circuit.
Mar 2 2004	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Mar 3 2004	Brief of respondents Donal Campbell, Commissioner, Alabama Department of Corrections, et al. filed. (Distributed)
Mar 3 2004	Brief amici curiae of Orrin Hatch and Tom DeLay filed. (Distributed)
Mar 3 2004	Brief amici curiae of Ohio and 29 Other States filed. (Distributed)
Mar 19 2004	Reply of petitioner David L. Nelson filed. (Distributed)
Mar 29 2004	Argued. For petitioner: Bryan Stevenson, Montgomery, Ala. For respondents: Kevin C. Newsom, Solicitor General, Montgomery, Ala.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

03-6821 (3)

No. _____

IN THE UNITED STATES SUPREME COURT

October Term, 2003

LODGING
FILED
OCT - 9 2003
CLERK

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL,
In his individual and official capacity as
Commissioner of the Alabama Department of Corrections,
and
GRANTT CULLIVER,
In his individual and official capacity as Warden of William C.
Holman Correctional Facility,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Execution scheduled for 6:00 p.m. Central Time on October 9, 2003

Cut-down procedure expected to begin at approximately 4:00 p.m. Central Time

MICHAEL KENNEDY McINTYRE*
H. VICTORIA SMITH
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(404) 688-0900

Counsel for Petitioner
David Larry Nelson

* Counsel of Record

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DAVID LARRY NELSON Petitioner, vs DONAL CAMPBELL, Commissioner, Department of Corrections, and GRANTT CULLIVER, Warden, Holman Correctional Facility Respondents.	)	No. _____

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

COMES NOW Petitioner David Larry Nelson, by and through undersigned counsel, who seeks leave to file the attached Petition for Writ of Certiorari in the United States Supreme Court without prepayment of fees and costs, and to proceed in forma pauperis, pursuant to Rule 39 of the Rules of this Court, and shows the following:

1.

The Petitioner has been incarcerated since January 1978.

2.

The Petitioner is currently under a sentence of death and incarcerated under the custody of the State of Alabama at Holman State Prison in Atmore, Alabama.

3.

The Petitioner has an execution date of October 9, 2003 at 6:00 p.m. Central Time.

4.

The Petitioner was allowed to proceed in forma pauperis in District Court and before the United States Court of Appeals for the Eleventh Circuit.

5.

Given the Petitioner's indigency, undersigned counsel have been appointed to represent him under the Criminal Justice Act.

WHEREFORE the Petitioner respectfully requests that he be allowed to proceed in forma pauperis.

Respectfully submitted,

_____
Michael Kennedy McIntyre
Counsel for David Larry Nelson

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(404)688-0900

_____
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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DAVID LARRY NELSON)
)
Petitioner,)
) No. _____
vs)
)
DONAL CAMPBELL,)
Commissioner, Department of Corrections,)
)
and GRANTT CULLIVER,)
Warden, Holman Correctional Facility)
Respondents.)

CERTIFICATE OF SERVICE

I, Michael Kennedy McIntyre, do hereby certify that a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis has been served via facsimile transmittal upon:

Mr. Michael Billingsley
Deputy Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 242-2848

Dated: This _____ day of October, 2003.

Michael Kennedy McIntyre
Counsel for David Larry Nelson

No. 03A308

LODGING

IN THE UNITED STATES SUPREME COURT

October Term, 2003

Supreme Court, U.S.
FILED
OCT 2003
CLERK

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL,
In his individual and official capacity as
Commissioner of the Alabama Department of Corrections,
and
GRANTT CULLIVER,
In his individual and official capacity as Warden of William C. Holman
Correctional Facility,
Respondents.

Supreme Court, U.S.
FILED
OCT - 9 2003
CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR STAY OF EXECUTION

Execution scheduled for 6:00 p.m. Central Time on October 9, 2003

Cut-down procedure expected to begin at approximately 4:00 p.m. Central Time

MICHAEL KENNEDY McINTYRE*
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507 The Grant Building
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Counsel for Petitioner
David Larry Nelson

* Counsel of Record

No._____

IN THE UNITED STATES SUPREME COURT

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR STAY OF EXECUTION

Petitioner David Larry Nelson is scheduled to be executed in Alabama at 6:00 p.m. Central Time on Thursday, October 9. Mr. Nelson has filed a Petition for Writ of Certiorari in this Court.

Because the Petition for Writ of Certiorari raises important legal questions, Mr. Nelson respectfully asks that this Court issue an immediate stay of execution, until such time as all Justices have had an opportunity to review the petition.

Respectfully submitted,

_____
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Attorney for Petitioner

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Attorney for Petitioner

507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
Telephone (404) 688-0900
Fax No. (404) 525-4609

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of this Motion for Stay of Execution by facsimile transmittal to the following:

Mr. Michael B. Billingsley
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 242-2848

Dated: This ____ day of October, 2003.

Michael Kennedy McIntyre

LODGING

No. _____

IN THE UNITED STATES SUPREME COURT

October Term, 2003

DAVID LARRY NELSON,
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vs.

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Counsel for Petitioner
David Larry Nelson

* Counsel of Record

QUESTIONS PRESENTED

1. Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. § 1983, which does not attack a conviction or sentence, is - simply because the person is under a sentence of death - to be treated as a habeas corpus case subject to the restriction on successive petitions which categorically precludes review of *any* constitutional violation not related to innocence (as the Fourth, Fifth and Eleventh Circuits hold), or can be maintained as § 1983 action (as the Sixth, Eighth and Ninth Circuits and several lower courts hold)?

2. Whether a cut-down procedure which involves pain and mutilation, conducted prior to an execution by lethal injection, violates the Eighth Amendment to the United States Constitution?

LIST OF PARTIES

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ATTACHMENT 5 Correspondence to Alabama Department of Corrections Requesting Lethal Injection Protocol

ATTACHMENT 6 Alabama Department of Corrections Response Denying Request for Lethal Injection Protocol

ATTACHMENT 7 Affidavit of Mark Sonnier Dated October 11, 2003 and Notorized October 7, 2003

ATTACHMENT 8 Affidavit of Mark Heath, M.D. Dated October 7, 2003

ATTACHMENT 9 Affidavit of Mark Heath, M.D. Date October 6, 2003

ATTACHMENT 10 Order Entered by the United States District Court for the Middle District of Alabama

ATTACHMENT 11 Order entered by the United States Court of Appeals for the Eleventh Circuit

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IN THE UNITED STATES SUPREME COURT

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In his individual and official capacity as
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner David Larry Nelson respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Order entered by the United States Court of Appeals for the Eleventh Circuit is attached as Attachment 11. The Order entered by the United States District Court for the Middle District of Alabama is attached as Attachment 10.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its judgment on October 8, 2003. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or [shall] cruel or unusual punishment be imposed.

and the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves application of 28 U.S.C. § 2244, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which provides, in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) the factual predicate for the claim could not have been discovered

> previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS:

David Larry Nelson brought this action pursuant to 42 U.S.C. § 1983 to challenge the cut-down procedure which the Respondents intend to utilize in order to gain venous access prior to Mr. Nelson's execution. The cut-down procedure involves pain and mutilation. Mr. Nelson asserted that the Respondents should utilize the percutaneous central line placement to gain venous access. As such, Mr. Nelson was not and is not challenging the validity of his conviction or sentence but is challenging the cut-down procedure which will be utilized prior to his execution.

The District Court treated the action as a successive habeas petition and found that it did not have jurisdiction. Attached as Attachment 10. In so finding the District Court stated:

> It would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment rights. (Attachment 10 at page 13).

On October 8, 2003 a Panel of the Eleventh Circuit affirmed the District Court by a vote of 2 to 1. Attached as Attachment 11. In dissent, Judge Wilson stated:

> In light of the clear authority indicating that Nelson's claim should be construed exclusively under §1983, I strongly disagree with the majority's holding. (Attachment 11 at page 7)
>
> Nelson seeks only a temporary stay of execution until concerns regarding the manner of his execution are addressed. (Attachment 11 at page 7)

> The "cut down" procedure that is to be used in his execution is not within Alabama's execution procedure, nor has it been reviewed to ensure that it passes muster the Eighth Amendment. Nelson merely requests that a different, more humane procedure known as "percutaneous central venous- cannulation" be used to carry out his execution, rather than the outmoded and painful "cut down" procedure. Regardless of which procedure is used, Nelson will be executed by lethal injection in accordance with his sentence. However, with the implementation of the "cut down" procedure, Nelson's Eighth Amendment rights may be compromised in the process. (Attachment 11 at page 9-10).

B. STATEMENT OF FACTS:

Petitioner David Nelson presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama (hereinafter referred to as "Holman"). The Petitioner is scheduled to be executed by lethal injection at 6:00 p.m. Central Time on October 9, 2003 at Holman.

The Petitioner was transferred to Holman from Donaldson Correctional Facility in Bessemer, Alabama (hereinafter referred to as "Donaldson") upon his death warrant being issued by this Court.

The Petitioner has severely compromised veins and has encountered problems over the last two decades with prison medical personnel gaining venous access during routine physical examinations. On at least one occasion, prison medical personnel has relinquished control of medical apparatus to the Petitioner for the Petitioner to draw his own blood after failed attempts by the

medical personnel to do same.[1]

Counsel for the Petitioner contacted Warden Grantt Culliver prior to the Petitioner's transfer from Donaldson to Holman and informed Warden Culliver of the Petitioner's physical problems regarding his veins and of concerns regarding the protocol for gaining venous access for the lethal injection procedure. At that time, counsel for the Petitioner requested that either a private practice physician hired by the Petitioner be allowed to examine and consult with the Petitioner upon his arrival at Holman regarding venous access for the lethal injection procedure or that a prison physician examine and consult with the Petitioner regarding same upon his arrival at Holman.

Warden Culliver assured counsel for the Petitioner that he would arrange for a physician to examine and consult with the Petitioner regarding this issue soon after the Petitioner's arrival at Holman. (See Correspondence from undersigned counsel Smith to Warden Culliver confirming their telephone conversation, attached to this pleading as Attachment 3). However, as of Friday, October 3, 2003, Warden Culliver had failed to have a physician so examine and consult with the Petitioner.[2] Furthermore, Warden Culliver

1 The Petitioner is unable to attach a copy of his medical records to this pleading in support of the above allegation, because the Alabama Department of Corrections has refused to allow the Petitioner access to his own medical records. (See, Correspondence to undersigned counsel Smith from the Alabama Department of Corrections, attached to this pleading as Attachment 2).

2 It is anticipated that the Respondent will claim that the Petitioner has waited until the "last minute" to seek relief. However, it should be noted that the Petitioner has continuously and consistently since mid-August 2003 attempted to have the Petitioner examined by a physician, to acquire the State of Alabama's written protocol for the legal procedure of execution by lethal injection and/or for the medical procedure that will be necessary to be performed as a predicate

refused repeated requests that a private physician hired by the Petitioner be allowed to examine and consult with the Petitioner.[3] Warden Culliver also has refused to allow that same private physician to conduct a telephone conference with the medical personnel Warden Culliver intends to have perform the venous access procedure prior to the Petitioner's execution or with any other prison medical personnel.

During the above-referenced telephone conversation between Warden Culliver and undersigned counsel Smith, counsel for the Petitioner also requested from Warden Culliver a copy of the State of Alabama's protocol for the lethal injection procedure. Warden Culliver refused to provide counsel for the Petitioner with same. (See Attachment 3).

Furthermore, Warden Culliver refused to provide any meaningful information concerning the protocol for the lethal injection procedure or for the medical procedure that would have to be

to the execution, and to ensure that a credentialed physician with adequate training and experience would perform the medical procedure on the Petitioner with access to proper medical equipment. The Respondent has continuously and consistently frustrated the Petitioner's efforts in these endeavors. As is set forth in detail in this pleading, on Friday, October 3, 2003, Warden Culliver informed the Petitioner that the medical procedure he originally had described to the Petitioner had been changed. It was at this time that the Petitioner came to have a good faith belief that the Respondent does not have a written protocol for the medical procedure that the Respondent intends to perform. The Petitioner immediately sought relief in the forum in which he believed was the most appropriate to seek relief from a violation of the Eighth Amendment prohibition against cruel and unusual punishments. The Petitioner filed an action pursuant to 42 U.S.C. §1983 in the United States District Court for the Middle District of Alabama. The Petitioner's appeal of the denial of said action is still pending.

3 Said refusal was a clear violation of Ala.Code 1975 §15-18-81, which provides in relevant part, "...all persons outside the said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business...". A copy of Ala.Code 1975 §15-18-81 is attached to this pleading as Attachment 4.

implemented to gain venous access to the Petitioner prior to the execution despite counsel's representation to Warden Culliver that the Petitioner had a valid basis for his concerns. (See Attachment 3).

It should be noted that counsel for the Petitioner also contacted the Alabama Department of Corrections by telephone and then by faxed correspondence to request a copy of Alabama's protocol for the lethal injection procedure and the medical procedure that would have to be implemented to gain venous access to the Petitioner as a prior to the execution. (See Attachment 5). The Alabama Department of Corrections denied this request by email response. (See Attachment 6).

Warden Culliver and a prison nurse employed at Holman met with the Petitioner on two separate occasions after the Petitioner's arrival at Holman and described to the Petitioner the procedure Warden Culliver intends to implement in order to gain venous access prior to the execution. Ironically, this nurse is the same medical personnel referenced above who had to relinquish medical apparatus to the Petitioner for the Petitioner to draw his own blood during a routine physical examination.

Notably, Warden Culliver during the first meeting with the Petitioner acknowledged to the Petitioner that the Petitioner does exhibit compromised veins. Of paramount importance, during that first meeting **Warden Culliver** also **informed the Petitioner that a**

medical procedure will have to be performed on the Petitioner prior to the Petitioner's execution in order for Warden Culliver to gain venous access.

Warden Culliver furthermore acknowledged to counsel for the Petitioner **that the Petitioner's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access**.

Based upon conversations in which counsel for the Petitioner has engaged with Warden Culliver and with the Alabama Department of Corrections, counsel for the Petitioner in good faith submits to this Court that the State of Alabama does not have as part of its lethal injection protocol written medical procedures that comport with contemporary medical standards for gaining venous access in condemned inmates such as the Petitioner prior to an execution.

Furthermore, counsel for the Petitioner in good faith submits to this Court that Warden Culliver and the Alabama Department of Corrections are designing a medical procedure to be followed as a predicate to the Petitioner's execution without being qualified to so design such medical procedure. Furthermore, counsel for the Petitioner in good faith submits to this Court that the State of Alabama is overstepping its authority in attempting to perform medical procedures outside of a medical setting without appropriate medical safeguards in an attempt to carry out the legal procedure of execution.

Warden Culliver and the Department of Corrections appear to be designing and intend to implement a medical procedure to be

performed outside of a suitably equipped medical facility as a predicate to the legal procedure of execution by lethal injection. Counsel for the Petitioner alerts this Court that the procedure as described by Warden Culliver to the Petitioner is **exceptionally** suspect and carries with it a **significant risk** that the prohibitions against cruel and unusual punishments will be violated by its use.

Specifically and as stated above, Warden Culliver and the aforementioned nurse met with the Petitioner together on two separate occasions to describe the medical procedure that Warden Culliver intends to implement with the Petitioner to gain venous access. Warden Culliver and the nurse initially described the medical procedure as (1) involving an incision of approximately 0.5 inch being made in the Petitioner's arm through which a catheter would be inserted into a vein and (2) being performed at least twenty-four hours in advance of the execution. More recently, however, Warden Culliver and the nurse informed the Petitioner that (1) the incision will be approximately two inches in length and will be made either in the Petitioner's leg or arm, (2) this medical procedure will not be performed until approximately one hour before the execution, and (3) only a local anesthetic will be used during the procedure.

In an affidavit submitted by Warden Culliver which was filed in the United States District Court for the Middle District of Alabama, Warden Culliver describes yet a third version of the procedure he will follow. Specifically:

> ... The doctor has told me that he will first attempt to connect a direct intravenous line to the femoral vein located in the thigh. If this procedure is unsuccessful, the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck. The doctor told me that he has performed these procedures hundreds of times. The last procedure that the doctor will attempt, should it become necessary, will be to make a two inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The doctor told me that this last procedure involves the administration of a local anesthetic.

(See Paragraph 4 of Attachment 1). Logically, if the State of Alabama had a written protocol for the medical procedure necessary to be performed immediately prior to an execution of condemned prisoners with whom peripheral intravenous access was not possible, there would be no discrepancies between Warden Culliver's descriptions of the procedure to the Petitioner.

Perhaps more troubling than the discrepancies in the descriptions of the procedures is the fact that the descriptions are evidence that **Warden Culliver has no idea what he is doing and has either no comprehension of or no concern for the risks or pain and suffering to which he intends to subject the Petitioner.**

An excerpt from Warden Culliver's Affidavit that describes the medical procedure he intends to use prior to the Petitioner's execution has been reproduced above. Dr. Marc Sonnier, with whom Warden Culliver consulted, also submitted an Affidavit in the United States District Court for the Middle District of Alabama and basically described the procedure to be performed as Warden

Culliver did in his affidavit. Notably Dr. Sonnier's affidavit was dated October 11, 2003 but was notorized on October 7, 2003. Also, Dr. Sonnier claims that if attempts to locate and attach the intravenous line to the femoral vein located in the upper thigh of Mr. Nelson are unsuccessful, an attempt will then be made to "attach the intravenous line to the **external carotid vein** in the neck." (See Paragraphs 2 and 3 of Affidavit of Dr. Marc Sonnier, attached to this pleading as Attachment 7)(emphasis supplied).

As is made clear by the Affidavit of Mark Heath, M.D.[4], which was submitted to the United States District Court for the Middle District of Alabama on behalf of the Petitioner and which is attached to this Brief as Attachment 8, **the "external carotid vein" does not exist in human beings**. (See Paragraph 5 of Attachment 8). The term "external carotid vein" is not listed in Stedman's Medical Dictionary or in Dorland's Medical Dictionary. (See Paragraph 6 of Attachment 8). Furthermore, Dr. Ernest April, Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (See Paragraph 7 of Attachment 8).

It cannot be stressed enough that Warden Culliver is not operating with a sufficient knowledge base concerning the medical procedure which necessarily must be performed on the Petitioner as a predicate to the legal procedure of execution to design, perform,

4 Dr. Mark Heath is a licensed physician who is a Board Certified anesthesiologist and assistant professor at Columbia University College of Physicians and Surgeons.

or oversee this medical procedure. Furthermore, the medical "experts" with whom Warden Culliver is consulting (a physician who refers to non-existent parts of human anatomy and a nurse who had to relinquish control of medical apparatus to her patient to draw his own blood) are undeniably unqualified to be in the position of advising Warden Culliver regarding such matters.

As yet more evidence of this assertion is the fact that Warden Culliver described the procedure to undersigned counsel on October 3, 2003 as basically being that described to the Petitioner during his second meeting with Petitioner - - which involved a two inch incision being made in the Petitioner and a catheter being inserted through the incision into a vein-- but also claimed that the procedure would not be a cut-down procedure.

According to Board Certified anesthesiologist Dr. Mark Heath, the procedure described by Warden Culliver is precisely a cut-down procedure. (See Paragraph 8 of the Affidavit of Mark Heath, M.D., attached to this pleading as Attachment 9). Again, it is clear that Warden Culliver does not have the requisite knowledge base to be in charge of designing, performing, or overseeing this medical procedure.

Based upon the descriptions of the procedure Warden Culliver has given the Petitioner and undersigned counsel, based upon a telephone conversation between undersigned counsel Smith and Mr. Andy Redd of the legal department of the Alabama Department of Corrections, and based upon the aforementioned Affidavit of Dr. Sonnier which was submitted in the District Court, undersigned

counsel in good faith believes that Warden Culliver in fact does intend to perform a cut-down procedure on the Petitioner to gain venous access prior to the Petitioner's execution by lethal injection.

A cut-down procedure is an invasive and barbaric medical procedure which does not comport with the contemporary practice of medical care. [See Paragraphs 21, 22, 23, and 24 of the Affidavit of Mark Heath, M.D. attached to this pleading as Attachment 9. Cites to this Affidavit in the following paragraphs will be as follows: Heath Affidavit 9:appropriate paragraph number(s)].

This medical procedure is invasive, it may give rise to serious medical complications, it involves unnecessary pain and suffering, it involves the mutilation of the Petitioner's body, and there are better methods available for a qualified physician to perform on the Petitioner to gain venous access which would comport with contemporary medical care standards. (Heath Affidavit 9:18, 20, 21, 22, 23, and 24).

According to Dr. Heath, a cut-down procedure involves making a series of surgical incisions through the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached. Heath Affidavit 9:9). During a cut-down procedure, blood vessels may have to be closed either by the use of cautery or the use of ligatory suture. (Heath Affidavit 9:11).

Furthermore, cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain) because otherwise, it would be an extraordinarily disturbing and distressing experience. (Heath Affidavit 9:13).[5]

Of great concern is the fact that many complications of the cut-down procedure are well-recognized by the medical community. (Heath Affidavit 9:18). These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (Heath Affidavit 9:18).

Whenever a cut-down procedure is performed in an elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. (Heath Affidavit 9:18).

The Respondent has not assured the Petitioner that any of the

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5 It should be highlighted that Dr. Sonnier claims that Warden Culliver will only use a local anesthetic during the cut-down procedure Warden Culliver intends to perform on the Petitioner. (See Paragraph 4 of Dr. Sonnier's Affidavit, Attachment 7).

drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman. Furthermore, the Respondent refuses to supply the Petitioner with any meaningful information concerning the personnel who will be present during the medical procedure to be performed on the Petitioner prior to the legal procedure of his execution by lethal injection.

As Dr. Mark Heath explains, many, if not most, physicians have never personally performed a cut-down procedure and do not possess the requisite skills for competently and safely performing such a procedure. (Heath Affidavit 9:14). Hospitals in the private sector require medical practitioners to be credentialed for the specific procedure of cut-downs for the purpose of safeguarding patients by ensuring that procedures are performed by experienced and competent personnel. (Heath Affidavit 9:15). Subjecting a person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome. (Heath Affidavit 9:16). Any person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure. (Heath Affidavit 9:17). In the absence of such a review, and particularly given Warden Culliver's refusal to permit such scrutiny, there is a complete lack of any reasonable assurance that the medical procedure Warden Culliver intends to perform on the Petitioner as

a predicate to his execution will be humane. (Heath Affidavit 9:17).

The cut-down procedure Warden Culliver apparently intends to perform on the Petitioner carries with it a substantial risk of inflicting substantial and prolonged pain and does not comport with evolving standards of decency. The cut-down procedure that Warden Culliver intends to perform on the Petitioner undeniably carries with it the potential for unnecessary mental as well as physical pain and suffering during the execution process. The Respondent is displaying deliberate indifference to known risks of serious harm to the Petitioner in violation of the Eighth Amendment to the United States Constitution. See Estelle v. Gamble, 429 U.S. 97 (1976); and Farmer v. Brennan, 511 U.S. 825 (1994).

As this Court stated in Farmer v. Brennan, 511 U.S. at 845 (citations omitted):

> In a suit such as petitioner's, insofar as it seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct," their attitudes and conduct at the time suit is brought and persisting thereafter.

It is abundantly clear that the Respondent's attitude has and continues to be one of deliberate indifference to the substantial risks of serious injury to the Petitioner.

According to Dr. Mark Heath, there is an alternative procedure that Warden Culliver could utilize in gaining venous access in the

Petitioner that would easily remedy or mitigate the risks of unnecessary pain and suffering inherent in the cut-down procedure Warden Culliver intends to utilize. (Heath Affidavit 9:20, 21, 22, and 23). This alternative procedure is referred to by several terms, including percutaneous central line placement, percutaneous central access, percutaneous central venous cannulation, and percutaneous technique. (Heath Affidavit 9:23). This procedure has, except in rare circumstances, supplanted the use of the cut-down procedure and is superior to the cut-down procedure in virtually all regards. (Heath Affidavit 9:23). This procedure is less invasive, less painful, faster, cheaper, and safer that the cut-down procedure. (Heath Affidavit 9:23). Additionally, because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure.

The Respondent has not articulated a reason for implementing the outdated and barbaric cut-down medical procedure (which violates the prohibitions against cruel and unusual punishments) on the Petitioner in lieu of the medical procedure available that meets contemporary standards of medical care (which does not violate the prohibitions against cruel and unusual punishments).

Of great significance and as referenced above, Warden Culliver will not disclose the training or qualifications of the person(s) responsible for performing either the medical procedure on the Petitioner that Warden Culliver has acknowledged must be performed

as a predicate to the legal procedure of execution or the legal procedure of execution by lethal injection. As such, it is unknown to anyone other than the Respondent whether a physician with the appropriate credentials, training, and experience will be present during the requisite medical procedure prior to the execution and/or the legal procedure of execution by lethal injection.

The refusal of the Respondent to identify and describe the medical personnel that will be present during the medical procedure performed on the Petitioner and during the execution itself raises issues of constitutional importance. The Respondent is deliberately preventing the public, the courts, and the condemned prisoners themselves from knowing any meaningful information about the lethal injection protocol and any accompanying medical procedure protocol that the Respondent intends to use in the killing of citizens of the State of Alabama. Independent public scrutiny undeniably plays a significant and indispensable role in the proper functioning of capital punishment. Public disclosure of Alabama's lethal injection protocol and accompanying mandated medical procedures for gaining venous access are critical in allowing the public to determine whether the punishment of execution by lethal injection in the State of Alabama comports with the evolving standards of decency which mark the progress of a maturing society.

For this Court and for the public to determine whether lethal injection execution in the State of Alabama is being humanely

administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners. As it stands now, this Court, the public, and the Petitioner are being forced to rely upon the very people responsible for designing and administering the protocol and performing the invasive and risky medical procedures for assurances that the protocol and procedures are sound and that they comport with "the evolving standards of decency". Trop v. Dulles, 356 U.S. 86, 101 (1958).

It should be stressed that there exists a humane method for gaining venous access in the Petitioner that does not violate the Petitioner's rights, but Warden Culliver is adamant that he intends to implement an inhumane method for gaining venous access in the Petitioner that does violate the Petitioner's rights.

Given the fact that Warden Culliver has conceded that the Petitioner's execution will mark the first instance of the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to gain venous access, there exists a substantial risk that the Respondent intends to violate the prohibitions against inflicting cruel and unusual punishments with respect to the Petitioner.

Given the posture that the Respondent has taken regarding the secrecy of the lethal injection protocol and accompanying mandated

medical procedures, this Court cannot be confident that the Respondent is taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in administering the punishment of lethal injection execution to the Petitioner.

Where, as here, the Petitioner has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, it is respectfully submitted that this Court cannot, in good conscience, condone the risk of sending the Petitioner to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of unnecessary pain in the execution of the death sentence will be honored.

Failure to provide relief will result in irreparable harm in that the Respondent will perform the above-described cut-down procedure on the Petitioner prior to his execution which is scheduled for 6:00 p.m. Central Time on October 9, 2003. Since the Petitioner has been informed that he will be allowed to receive visitors only until 4:00 p.m. on October 9, 2003, the Petitioner believes that the Respondent may perform the medical procedure that violates the Petitioner's rights as guaranteed by the Eighth Amendment as early as 4:01 p.m. Central Time on October 9, 2003.

REASONS FOR GRANTING THE WRIT

This case presents questions of extraordinary importance whether death-sentenced inmates are to be denied the right to bring actions under 42 U.S.C. § 1983 simply because of their sentence. If the decision below is correct, death-sentenced inmates who have filed a federal habeas corpus petition are barred from bringing any § 1983 action that could be brought by other inmates, such as suits based on failure to protect from know risk of harm from other inmates,[6] the malicious and sadistic infliction of harm by prison guards,[7] "unnecessary and wanton infliction of pain,"[8] denial of medical care,[9] or denial of the minimal civilized measure of life's necessities.[10]

The holdings below make this Court the only avenue for a unique and limited set of claims that may arise long after habeas corpus proceedings have ended, such as competence to be executed and some claims - such as deprivation of good conduct time credits - that can *only* be raised in habeas corpus, see Preiser v. Rodriguez, 411 U.S. 475 (1973), and burdening this Court with the duty to engage in fact-finding determinations usually conducted by trial courts

6. See Farmer v. Brennan, 511 U.S. 825 (1994).
7. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992); Whitley v. Albers, 475 U.S. 312, 320-21 (1986).
8. See Rhodes v. Chapman, 452 U.S. 337, 346 (1981).
9. See Estelle v. Gamble, 429 U.S. 97 (1976).
10. See Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999).

I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS BY DECIDING WHETHER ALL CLAIMS BROUGHT BY DEATH-SENTENCED INMATES PURSUANT TO 42 U.S.C. § 1983 ARE TO BE TREATED AS SUCCESSIVE HABEAS CORPUS PETITIONS.

This Court should grant certiorari because the Eleventh Circuit and other circuits have misread this Court's decision in Gomez v. United States District Court, 503 U.S. 653 (1992) and Lonchar v. Thomas, 517 U.S. 314 (1996), to hold that any actions brought under 42 U.S.C. § 1983 by a death-sentenced prisoner are to be treated as successive habeas corpus petitions. The Eleventh Circuit has repeatedly held that Gomez and Lonchar "mandate the conclusion that 'a § 1983 claim is subject to the procedural requirements for bringing a second or successive habeas claim.'" Spivey v. Board of Pardons and Paroles, 279 F.3d 1301, 1302 (11th Cir. 2002) (quoting Felker v. Turpin, 101 F.3d 95, 96 (11th Cir. 1996)).

Despite the fact that § 1983 cases do not challenge the conviction or sentence, the Eleventh Circuit has applied Gomez to find that any claim raised in a § 1983 action "necessarily implies a challenge to the imposition of his sentence." Spivey, 279 F.3d at 1302 n. 1 (finding that challenge to propriety of clemency proceedings implied a challenge to his sentence); see also Felker v. Turpin, 101 F.3d 95, 96 (11th Cir. 1996) (finding challenge to means of execution to be the "functional equivalent" of a second habeas corpus petition).

However, Gomez, a three-paragraph *per curiam* decision decided in a few hours on an application to vacate a stay of execution issued by the Ninth Circuit, did not hold that all § 1983 claims brought by death-sentenced inmates were to be treated as successive habeas petitions, but that because the inmate there sought an equitable remedy, equity must take into account all of the relevant factors, including the State's interest proceeding with its judgment. Gomez involved a plaintiff who had filed four federal petitions for habeas corpus, some that same night, and who raised a claim within hours of his execution that could have been raised ten years earlier. Id. at 653-54. This case, in contrast, involves an inmate who has filed only one habeas corpus petition concerning his current sentence, and who raises a claim that only arose recently.

In addition, Gomez was decided in 1992 before passage of the Antiterrorism and Effective Death Penalty Act, which drastically restricted claims that could be brought in successor petitions to those that involved a constitutional violation that established innocence. Gomez held that in the unique circumstances presented there, the equitable principles then in existence with regard to abuse of the writ should be applied. However, this Court has never held that the drastic statutory restrictions contained in 28 U.S.C. 2244(b) apply to 1983 actions, and apply only to 1983 actions brought by death-sentenced inmates, not other inmates who have previously litigated habeas corpus claims. There is no basis for

such a distinction. Indeed, this Court held in Lonchar v. Thomas that courts are not to abandon the normal "statutes, rules, precedents and practices" in capital cases, but to adhere to them.

The Eleventh Circuit had earlier found that a challenge to the means of execution was properly brought under § 1983, see Sullivan v. Dugger, 721 F2d 729 (11th Cir. 1983) ("Petitioner does not challenge the fact or nature of his sentence or the state's right to execute him thus distinguishing this § 1983 action from one brought under 28 U.S.C. § 2254 (habeas corpus)."), as had a district court within the Eleventh Circuit. See Jones v. McAndrew, 996 F. Supp. 1439, 1443-1447 (N.D. Fla. 1998). In Jones, the district court, observing that the challenge to the procedures for putting someone to death was "not analytically different from cases brought under § 1983 every day," concluded that "[u]nless the court is to adopt a results-oriented approach to litigation involving the death penalty, the same general principles that apply generally to habeas petitions and § 1983 actions must be followed here." Id. at 1444. Similarly, the Ninth Circuit, in concluding that a challenge to the method of execution was properly brought as a § 1983 action stated: "To hold otherwise would carve out of habeas and § 1983 law a separate jurisprudence for death penalty cases. There is no authority for such a dichotomy." Fierro v. Gomez, 77 F.3d 301, 304 (9th Cir. 1996).

The Eleventh Circuit, however, has now adopted exactly such an approach. In Felker v. Turpin, the court said that it declined to

follow its own precedent in Sullivan because of this Court's decision in Gomez. See Felker v. Turpin, 101 F.3d at 96 n. 1. Some other circuits have adopted the same approach. See, e.g., Beets v. Texas Board of Pardons and Paroles, 205 F.3d 192, 193 (5th Cir. 2000) (holding challenges to clemency proceeding must be pursued by writ of habeas corpus); McQueen v. Patton, 118 F.2d 460 (1997) (explicitly following the Eleventh Circuit in treating 1983 case about method of execution as a successive petition);

However, this Court considered a challenge to clemency proceedings in a § 1983 action in Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998). The Ninth Circuit held that a challenge to the method of execution was properly brought pursuant to § 1983 in Fierro v. Gomez, 77 F.3d at 303-306 and other circuits have considered § 1983 actions by death-sentenced inmates without treating them as habeas corpus actions. See, e.g., Young v. Hayes, 218 F.3d 850 (8th Cir. 2000) (action regarding interference by a state official in clemency proceedings properly brought as § 1983 action); Wilson v. United States District Court for the Northern District of California, 161 F.3d 1185 (9th Cir. 1998) (denying motion to vacate temporary restraining order granted by district court to hear § 1983 action regarding clemency proceedings); Duvall v. Keating, 162 F.3d 1058 (10th Cir. 1998) (considering § 1983 action regarding clemency procedures); Otey v. Hopkins, 5 F.3d 1185 (8th Cir. 1993) (same).[11] See also Dotson v. Wilkinson, 300

11. See also Booker v. Murphy, 953 F. Supp. 756 (S.D. Miss. 1997)

F.3d 661 (6th Cir. 2002) (finding prisoner's § 1983 action was improperly dismissed where it was challenging procedures used by state prison officials, which would not affect the duration of his sentence of validity of his conviction).

The Eleventh Circuit has suggested that such claims can be brought in original habeas petitions to this Court or in certiorari review of state court proceedings. But as Judge Barkett pointed out dissenting in Spivey v. Board of Pardons and Paroles:

> [I]n view of the demands of the Supreme Court's caseload and the discretionary nature of the Court's review, neither of these alternatives provides a regular and reliable avenue for hearing such claims. Moreover, it makes no sense to deprive a prisoner of review in the federal district and appellate courts simply because the basis emerged after an initial habeas petition was filed, when otherwise such review would clearly be available.

279 F.3d at 1305 n. 3. Determination of these actions also requires evidentiary development, something in which this Court does not engage.

The Court should grant certiorari in this case to decide this important question which has divided the circuit courts of appeal.

(considering challenge to lethal gas in 1983 action).

II. **THE CUT-DOWN MEDICAL PROCEDURE THAT THE RESPONDENTS INTEND TO PERFORM ON THE PETITIONER AS A PREDICATE TO THE LEGAL PROCEDURE OF EXECUTION BY LETHAL INJECTION UNDOUBTEDLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT PROSCRIBED BY THE EIGHTH AMENDMENT.**

This Court clearly set forth the standard of review for a claim of an Eighth Amendment violation of this nature in Estelle v. Gamble, 429 U.S. 97 (1976). In Gamble, this Court plainly stated:

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.

Id. at 104 (citations omitted). This Court further opined:

> In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 106.

This Court in Farmer v. Brennan, 511 U.S. 825 (1994) expanded upon its ruling in Gamble and defined "deliberate indifference". Specifically, this Court stated:

> A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment. [citations omitted]. This case requires us to define the term "deliberate indifference," as we do by requiring a showing that the official was subjectively aware of the risk.

Id. at 828-829. The Court further held:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety, the official must both be aware of facts from which the inference

> could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837.

Undoubtedly, the Respondents are displaying "deliberate indifference" to the Petitioner's "serious medical needs" and their deliberate indifference will result in the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Furthermore, the Respondents have repeatedly been made aware of and have disregarded the substantial risk of serious harm to the Petitioner if they perform the medical procedure they have outlined that they will perform as a predicate to performing the legal procedure of execution. The Respondents' indifference to this risk undeniably offends the evolving standards of decency in violation of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

Specifically, the Respondents intend to perform the barbaric method of a cut-down procedure to gain venous access in the Petitioner as a predicate to the legal procedure of execution which will involve making a series of surgical incisions through the Petitioner's skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached. (Heath Affidavit 1:9). The Respondents have asserted that they may opt to perform this cut-down in the Petitioner's arm despite the fact that it is unlikely that the Respondents will be able to

gain access to any veins in the Petitioner's arms and despite the fact that the procedure will be challenging, painful, and most likely ultimately unsuccessful. (Heath Affidavit 2:13). The Respondents with complete and deliberate indifference intend to perform this procedure despite the known substantial and extremely painful risks of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying sever distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (which can lead to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (Heath Affidavit 1:18). Furthermore, the Respondents intend to perform this surgical exploration under only a local anesthetic despite the fact that, in the rare instances in modern day medicine of a cut-down procedure being performed, cut-down procedures are usually performed under deep sedation due to the fact that it is an extraordinarily disturbing and distressing experience. (Heath Affidavit:13). As the United States District Court for the Middle District of Alabama noted in its opinion, the Respondents "have offered no explanation as to why they intend to use a cut-down procedure instead of a percutaneous central line placement" which is the medical procedure that meets contemporary medical care standards and which has, except in rare circumstances, supplanted the use of the cut-down procedure due to the fact that it is less invasive, less painful, faster, and safer. (Attachment 10 at pages 5-6)(Heath Affidavit 1:23).

Furthermore, the Respondents intend to perform this medical procedure that does not comport with contemporary medical standards without having access to a variety of drugs and medical equipment necessary that should be readily available in case of a mishap. (Heath Affidavit:18,22). The Respondents also are unwilling to guarantee that a physician with the appropriate credentials, training, and experience will be the one performing this risky medical procedure.

As Dr. Mark Heath opined, "Given the near universal adoption of superior techniques, there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be." (Heath Affidavit 1:21).

It is respectfully submitted that the cut-down procedure which the Respondents intend to utilize prior to the Petitioner's execution violates this Court's precedent under the Eighth Amendment. This Court should follow that precedent and should not allow the cut-down procedure to be conducted on the Petitioner.

CONCLUSION

For the foregoing reasons, Mr. Nelson respectfully asks that this Court issue a writ of certiorari to review the decision below.

Respectfully submitted,

MICHAEL KENNEDY McINTYRE
Georgia Bar No. 494075
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of this Petition for Writ of Certiorari by facsimile transmittal to the following:

Mr. Michael B. Billingsley
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 242-2848

Dated: This ____ day of October, 2003.

Michael Kennedy McIntyre

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff,	)	
v.	)	Case No. _____
DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, GRANTT CULLIVER, Warden of Holman Correctional Facility.	)	

AFFIDAVIT OF WARDEN GRANTT CULLIVER

I, Grantt Culliver, do solemnly swear to the following facts:

1. I am presently employed with the Alabama Department of Corrections as Warden of the Holman Correctional Facility. I have been employed in that capacity since August 2002. Before I became Warden at Holman, I was Warden at Fountain Correctional Facility.

2. Seven to ten days before receiving the execution warrant on September 3, 2003, I spoke on the telephone with Victoria Smith, who told me she was David Nelson's legal counsel. Ms. Smith said that Nelson's vein structure was poor in his lower arms and hands due to intravenous drug use. Ms. Smith brought up the possibility of whether

Nelson could be electrocuted because she believed it would be difficult to find a vein for the purpose of carrying out the execution by lethal injection. I told Ms. Smith that according to state law it was too late for Nelson to select the option of being electrocuted.

2. Because these concerns were expressed to me, I had a registered nurse examine Nelson around September 10 to see whether a vein could be found on his lower arms and hands to administer the lethal injection. The nurse reported to me that Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line.

3. Approximately three weeks ago, a second nurse examined Nelson in my presence. Nelson knew this nurse from Donaldson and reminded her that the medical personnel at the Donaldson Correctional Facility were unable to draw blood from Nelson's lower arms and hands because of his intravenous drug use. Nelson raised his pants leg to remind her of the location where the medical personnel took blood from him.

4 Because of the above-described facts, I have recently been in contact with a physician who resides in

Alabama who has agreed to perform any procedures necessary to connect a direct intravenous line. The doctor has told me that he will first attempt to connect a direct intravenous line to the femoral vein located in the thigh. If this procedure is unsuccessful, the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck. The doctor told me that he has performed these procedures hundreds of times. The last procedure that the doctor will attempt, should it become necessary, will be to make a 2 inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The doctor told me that this last procedure involves the administration of a local anesthetic.

5. Neither Nelson nor his lawyers have ever requested that a physician be admitted into Holman to perform an examination of Nelson.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 6, 2003, in Montgomery, Alabama.

Grantt Culliver

Sworn and subscribed before me this the 6th day of Ocotber, 2003.

Notary Public

Notary Public, AL State at Large
My commission expires 10/16/04.

ATTACHMENT 2

DON SIEGELMAN
GOVERNOR

STATE OF ALABAMA
DEPARTMENT OF CORRECTIONS

MICHAEL W. HALEY
COMMISSIONER

April 27, 2001

H. Victoria Smith, Esq.
507 The Grant Building
44 Broad Street, N.W.
Atlanta, GA 30303

Re: David Larry Nelson
AIS #Z-383

Dear Ms. Smith:

This will acknowledge receipt of your FAX of April 26, 2001, and further advise that I have informed Deputies Attorney General Clay Crenshaw and Michael Billingsley of your request. Pursuant to their instruction, we will require a court order to release these records.

If you have any further questions, would you please refer them to Messrs. Crenshaw and Billingsley.

Sincerely,

William F. Addison
Assistant General Counsel

WFA/eln

cc: Clay Crenshaw
Michael Billingsley

ATTACHMENT 3

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H. VICTORIA SMITH
LICENSED IN GA AND SC
hvs@michaelkennedymcintyre.com

August 19, 2003

Warden Grantt Culliver
Holman Correctional Facility
9677 Highway 21 N
Atmore, Alabama 36503

Re: David Larry Nelson, Z-383

Dear Warden Culliver:

Thank you for speaking with me today via telephone regarding Mr. Nelson's pending execution. As I stated during that telephone conversation, I am trying to learn as much as possible about the lethal injection procedures currently in use at your facility so that I may knowledgeably consult with Mr. Nelson regarding his upcoming execution. As we discussed, Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins.

Based on our telephone conversation, it is my understanding that you have a written protocol regarding execution procedures but are unwilling to provide that protocol to me. Also, you assured me that there will be "medical personnel" present during Mr. Nelson's execution, but you would not divulge any descriptions of the "medical personnel" (e.g., an anesthesiologist, a general practice physician, a registered nurse). You indicated that the "medical personnel" would have received "medical training"; however, you would not tell me anything about that training except that it was "medical" in nature. You would not divulge whether that training included instruction in execution methodology. Finally, you could not tell me anything about the "cutdown" procedure that would have to be implemented if the "medical personnel" could not find good veins on Mr. Nelson's arms.

You did agree to have Mr. Nelson evaluated by a physician once Mr. Nelson was transferred to your facility so that the physician could consult with Mr. Nelson about the difficulties that Mr. Nelson might encounter during the execution, and I thank you for agreeing to do so. As I told you, I am sure that such a consultation would alleviate some of the anxiety that Mr. Nelson is currently experiencing regarding the execution. I am assuming that the physician who examines Mr. Nelson will be allowed to review the protocol for the execution procedure so that he or she may speak intelligently about the procedure with Mr. Nelson.

Please contact me if anything in this correspondence is inaccurate. Thank you again for speaking with me.

Sincerely,

H. Victoria Smith

ATTACHMENT 4

AL ST § 15-18-81
Ala.Code 1975 § 15-18-81

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 18. SENTENCE AND PUNISHMENT.
ARTICLE 5. DEATH PENALTY.
§ 15-18-81. Confinement until execution; certain persons may visit condemned person.

Upon the receipt of a condemned person by the warden of Holman prison, he shall be confined therein until the time for his execution arrives; and, while so confined, all persons outside the said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Corrections.

(Acts 1923, No. 587, p. 759; Code 1923, § 5313; Code 1940, T. 15, § 347; Acts 1971, No. 2360, p. 3792.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORY

Code Commissioner's Notes

Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the Board of Corrections and vested all its rights, duties, power, property, etc., in the Governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

Ala. Code 1975 § 15-18-81, AL ST § 15-18-81

Current through End of 2003 Organizational Session

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END OF DOCUMENT

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ATTACHMENT 5

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LICENSED IN GA AND SC
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October 3, 2003

VIA FACSIMILE TRANSMITTAL

Mr. Andy Redd
Alabama Department of Corrections Legal Department
101 South Union Street
Montgomery, Alabama 36130
Fax No. (334) 353-3891

Re: Alabama Lethal Injection Protocol

Dear Mr. Redd:

Pursuant to our telephone conversation earlier today, please accept this correspondence as my formal request that I be provided with a copy of Alabama's lethal injection protocol. As we discussed, I represent Mr. David Larry Nelson, Z-383, who is scheduled to be executed by lethal injection by the State of Alabama on Thursday, October 9, 2003. Due to years of intravenous drug abuse, Mr. Nelson has severely compromised veins and is concerned about the procedure that the protocol dictates should be implemented in gaining venous access.

If you have any questions about this correspondence or my request, please contact me. Thank you for your assistance in this matter.

Sincerely,

H. Victoria Smith

ATTACHMENT 6

Original Message:

From: Redd, Andrew W ARedd@doc.state.al.us
Date: Fri, 3 Oct 2003 13:52:01 -0500
To: hvs@michaelkennedymcintyre.com
Subject: Request for Lethal Injection Protoco/David Larry Nelson Z-383

Dear Ms. Smith:

I have received and reviewed your request for a copy of the lethal injection protocol and have conferred with my superiors on this matter. I must inform you that we must deny your request.

Andy Redd
General Counsel

mail2web - Check your email from the web at http://mail2web.com/ .

ATTACHMENT 7

DAVID LARRY NELSON,

Plaintiff,

v.

STATE OF ALABAMA,

Defendant.

Case No. _____

AFFIDAVIT OF DR. MARC SONNIER

I, Marc Sonnier, do solemnly swear to the following facts:

1. I am a medical doctor employed by Naphcare, a company currently under contract to provide health care for the State of Alabama prison system. I received a Bachelor of Science degree in biology from the University of South Alabama in 1975 and a medical degree, also from the University of South Alabama, in 1981. I have worked in my current position for more than a year. I have been asked to describe and comment on several procedures medical personnel can undertake to locate a vein, for the purposes of drawing blood or setting up an IV line, from an individual who has compromised veins due to extensive intravenous drug use.

2. It is my understanding that the first procedure to be attempted will be to locate and attach the IV to the femoral vein located in the upper thigh. This is a routine procedure that I have conducted approximately 80 to 100 times in the past for the purpose of drawing blood from an individual with no superficial veins. Based on my knowledge, experience, and observations of the patients during the procedure, it is my opinion that it causes minimal pain similar to that experienced from a needle stick in the arm. In all the times I have conducted the procedure, I have been unable to successfully locate the vein approximately 8 to 10 times. In each of those instances, however, the failure can be attributed to the fact that the patient was obese.

3. I have been told that the second procedure to be attempted is to attach the intravenous line to the external carotid vein located in the neck. I have done this procedure 8-10 times. The external carotid vein provides access to an IV line and is actually a bigger caliper vessel than the ones in the lower arms and hands. The pain involved with this procedure would be no worse than if someone were attaching an IV to the wrist or arm.

4. It is my understanding that the next procedure to be attempted, if necessary is to perform a "cut-down" procedure by making a two inch incision in the antecubital fossa located in the front part of the arm in the bend of the elbow. The procedure involved here is to isolate and dissect the saphenous vein that is relatively easily accessible just beneath the skin. This is a procedure that I have employed 8-10 times. The procedure itself is painless because a local anesthetic is used.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2003. in ,Alabama.

Marc Sonnier

Sworn and subscribed before me this the 7 day of ~~September,~~ October 2003.

Notary Public

From: 334-353-8400 To: 8140452546O9 Page: 18/28 Date: 10/7/2003 12:28:10 PM

ATTACHMENT 8

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

My name is Mark Heath, M.D., and I have previously submitted an Affidavit regarding Mr. David Nelson's execution.

1.

I have reviewed two affidavits faxed to me at 2:19 PM Eastern Time on October 7, 2003 by Mr. Nelson's attorneys.

2.

The affidavit of Grantt Culliver quotes a registered nurse's finding that David Nelson does "not have any veins in his lower arms and hands sufficient to support a direct intravenous line".

3.

Based on David Nelson's history of intravenous drug abuse (IVDA) and the established lack of visible peripheral veins, it is highly likely that the personnel staffing his execution will be required to place a central line in either the femoral vein (in the groin), the subclavian vein (behind the clavicle or collar bone), or in one of the jugular veins (in the neck) - - the internal or external jugular vein.

4.

The affidavit of Grantt Culliver states that "the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck".

5.

The "external carotid vein" does not exist in human beings.

6.

The term "external carotid vein" is not listed in Stedman's Medical Dictionary and it is not listed in Dorland's Medical Dictionary.

7.

Dr. Ernest April, Associate Professor of Anatomy at Columbia University in New York City and Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (Personal Communication at 2:45 P.M.).

8.

It can be speculated that Mr. Culliver intended to refer to the "external jugular vein", a commonly-used structure for obtaining intravenous access if peripheral access can not be secured.

9.

I note that Mr. Culliver's affidavit preceded the Affidavit of Dr. Marc Sonnier by one day.

10.

Dr. Sonnier in his affidavit states that he has been instructed that, if necessary, he should place a catheter in the "external carotid vein" of Mr. Nelson for the purpose of performing lethal injection. Dr. Sonnier uses the term "external carotid vein" twice in the same paragraph, and states that he has employed this procedure "8 - 10 times" (in his 22 years since graduating from medical school).

11.

Dr. Sonnier's repeated use of the term "external carotid vein", combined with his recitation of his "understanding" of the order of procedures to be attempted, raises in my mind the concern that he lacks currency and proficiency with the advanced techniques of intravenous access that almost certainly will be necessary for the conduct of Mr. Nelson's execution.

12.

The use of the term "external carotid vein" by both Mr. Culliver and Dr. Sonnier can not be coincidental. It raises in my mind the concern that Dr. Sonnier is acting under instruction from Mr. Culliver, and that these instructions include specification of technical medical issues that are likely to beyond the professional training and credentialing of Mr. Culliver.

13.

A further concern is that Dr. Sonnier states that he might perform a cut-down procedure on David Nelson's arm. It is highly likely that, due to Mr. Nelson's history of intravenous drug abuse, the deep and superficial veins of his arm will be scarred and/or thrombosed (occluded by clot), thereby rendering a cut-down procedure in the arm ineffective. Surgical exploration of Mr. Nelson's arm is likely to be technically challenging and painful. Dr. Sonnier's stated experience with cut-downs is "8 - 10 times" over the entirety of his medical career. It needs to be determined whether Dr. Sonnier has been credentialed by his employer, Naphcare, or by any hospital in Alabama, to perform this surgical procedure. A prior experience of "8 - 10 times" is not sufficient for contemplating surgical exploration of the arm of an intravenous drug abuser with known compromise of subcutaneous veins.

14.

It is difficult for me to understand why the State of Alabama would not want to recruit a well-trained, highly proficient, currently credentialed surgeon to supervise and/or perform the procedures required for establishing intravenous access. This level of expertise is clearly warranted by the recognized condition of Mr. Nelson's peripheral veins.

I declare under the penalty of perjury that the foregoing is true and correct.

MARK HEATH, M.D.

ATTACHMENT 9

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

Personally appeared before me, Mark Heath, M.D., who, after first being duly sworn stated and affirmed under oath as follows:

1.

My name is Mark Heath, M.D., and I am more than eighteen years of age, sui juris, and am competent to give this Affidavit as I have personal knowledge of certain facts relative to the State of Alabama's planned execution of Mr. David Nelson.

2.

I am a physician licensed to practice medicine in the State of New York.

3.

I am a practicing anesthesiologist and am Board Certified in anesthesiology. I am an assistant professor of clinical anesthesiology at Columbia University College of Physicians and Surgeons, and teach I instruct medical students and residents and fellows in the practice of anesthesiology. My routine practice includes obtaining intravenous access in virtually all of my patients. Additionally, the majority of my patients require the placement of central venous catheters, and I personally supervise or perform the placement of these catheters. I conduct research in the field of anesthesiology sponsored by the National Institutes of Health and publish in the field of anesthesiology. My curriculum vitae is attached to this Affidavit.

4.

I was contacted by Mr. David Nelson's attorneys regarding their concerns about Mr. Nelson's severely compromised veins and their concern that the State of Alabama's execution team might encounter problems in attempting to gain venous access with Mr. Nelson during the lethal injection execution process.

5.

It is my understanding that gaining peripheral venous access to Mr. Nelson has been difficult during medical procedures conducted on Mr. Nelson in the past by prison personnel.

6.

It is my understanding that the warden who will be in charge of the execution at Mr. Nelson's prison has acknowledged to Mr. Nelson's attorneys that Mr. Nelson's compromised veins will present a novel situation for the State of Alabama's execution team in gaining venous access and will require that team for the first time to conduct a separate medical procedure prior to the execution.

7.

It is my understanding that both the warden of Mr. Nelson's prison and the Alabama Department of Corrections have refused to provide Alabama's written protocol for lethal injection executions to Mr. Nelson or his attorneys. As such, it is unknown by anyone other than those State of Alabama employees authorized to be in possession of the written protocol what procedures, if any, the protocol directs medical personnel to follow upon being presented with a condemned person such as Mr. Nelson with whom peripheral intravenous access is not possible.

8.

It is my understanding that the warden at Mr. Nelson's prison intends to gain venous access immediately preceding the execution by making a surgical incision of approximately two inches in length either in Mr. Nelson's leg or on his arm and inserting a catheter into one Mr. Nelson's veins through that incision. This procedure is known as a cut-down procedure.

9.

A cut-down procedure involves making a series of surgical incisions though the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached.

10.

A cut-down procedure can be performed on the arm or leg, or in the groin, neck, or chest. Patients who have been exposed to chronic intravenous chemicals, whether chemotherapy or drugs of abuse, often have severe scarring of the veins in the arms and legs, and cut-downs have to be performed in the neck, chest, or groin.

11.

During the procedure multiple small arteries and veins in the fat and muscle layers are transected and release blood; these blood vessels need to be closed either by the use of cautery or the use of ligatory suture. Tissue needs to be dissected away from the vein, usually using a technique called blunt dissection.

12.

If cautery is used, smoke will rise from the area of the incision and the room will smell of burning tissue, flesh, and blood. Cautery also makes a buzzing and sizzling sound as the water in the blood and tissue boils.

13.

When performed electively, which is quite uncommon (see below), cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain), because it would otherwise be an extraordinarily disturbing and distressing experience.

14.

A cut-down procedure is a surgical procedure that should be performed only by a physician or practitioner who is specifically trained and credentialed to perform that procedure. Many, or perhaps most, physicians have never personally performed a cut-down procedure. In particular, physicians who have not received postgraduate training in surgery or cardiology or emergency medicine are unlikely to be experienced and proficient in performing this procedure. Therefore, merely stating that a physician will be present at the execution fails to provide any assurance to the condemned prisoner that the procedure will be performed safely and competently.

15.

In the hospital setting medical practitioners are credentialed for specific procedures, including cut-down procedures. This system has been instituted to safeguard patients by ensuring that procedures are performed by experienced and competent personnel.

16.

Regardless of their status in society, no individual should be subjected to a surgical procedure such as a cut-down at the hands of an inexperienced practitioner. Any plan that involves subjecting any person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and a botched outcome.

17.

Any patient or person undergoing an elective cut-down procedure should be entitled to review the credentials, certification, and training record of the person or persons who will be performing the procedure. In the absence of such a review, and in particular in the presence of a refusal to permit such scrutiny, there is a complete lack of any reasonable assurance that the procedure will be humane.

18.

Complications of the cut-down procedure are well-recognized and are described in basic clinical textbooks. These complications include:

(a) Severe hemorrhage (bleeding) - the cut-down procedure involves a deep incision and dissection in the area of large blood vessels. Laceration of these blood vessels may result in bleeding that can obscure the surgical field and make surgical repair difficult. The likelihood of this occurring is increased if the proper equipment is not available. This equipment would include suction, surgical lighting, surgical instruments, and cautery. In the hospital setting a physician is able to quickly summon assistance should a hemorrhagic complication situation arise. There has been no assurance for Mr. Nelson that experienced and competent assistance will be readily available to treat the complication of severe hemorrhage. Death by hemorrhage and exsanguination (the emptying of blood from the body) is extremely distressing. It is accompanied by a sense of asphyxiation and terror, and would be inhumane were it to occur as the result of a deliberate and premeditated act.

(b) Pneumothorax – a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called pneumothorax. This complication involves the entry of air into the potential space between the lungs and the inner wall of the chest. This complication causes severe distress, including the sensation of suffocation, and if untreated often results in death by asphyxia and cardiovascular collapse. Death by pneumothorax would be agonizing and, if caused by a deliberate and premeditated act, would be inhumane. The treatment of pneumothorax involves the placement of a tube called a "chest tube", which when connected to a source of suction serves to evacuate the air from the space between the lung and the chest wall. Placement of a chest tube requires training and experience. It is likely that the majority of physicians, particularly those who have not completed post graduate surgical training, have never placed a chest tube. Placement of a chest tube also

requires the immediate availability of the proper medical equipment and supplies, and the availability of a source of suction.

(c) Cardiac dysrhythmia - a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called cardiac dysrhythmia. This is an abnormality of the electrical activity of the heart which can cause impaired pumping of blood and hemodynamic collapse (also called shock). The cut-down procedure causes this complication because the tip of the catheter can irritate the atrium or ventricle, the chambers of the heart, and trigger abnormal electrical activity. Recognition of this common complication requires the placement of EKG leads prior to performing the procedure, and requires frequent checking of the EKG trace while the catheter is being advanced. Treatment of life threatening dysrhythmias requires the use of the appropriate drugs and/or the use of electrical shocks from a device called a defibrillator. Failure to prepare for the diagnosis and treatment of the complication of dysrhythmia would place a patient, or anybody undergoing a cut-down procedure in the internal jugular vein or the subclavian vein, at risk of experiencing hemodynamic collapse. This is a terrifying experience that is often accompanied by severe chest pain, nausea, vomiting, and a sense of suffocation or asphyxia.

(d) Pain. – because of the invasive nature of the procedure, including blunt and sharp dissection through successive layers of skin, fat, and muscle, a cut-down procedure can be extremely painful. The risk of pain is greatly increased if the procedure is performed by personnel who are not well-experienced in surgical techniques.

19.

The obtaining of central venous access is commonly performed in therapeutic settings throughout the United States and the world.

20.

The cut-down technique is rarely used in the elective surgical setting because it has been supplanted by superior techniques that are safer, less painful, less invasive, faster, cheaper, and

easier to perform. In the elective setting, the cut-down technique is now almost exclusively reserved for the placement of cardiac pacemakers and for harvesting veins for coronary surgery. Elective cut-down procedures are performed in fully equipped operating rooms or catheterization labs under deep sedation or general anesthesia.

21.

Given the near universal adoption of superior techniques, there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be.

22.

Given the above-described risks involved with performing a cut-down procedure in an attempt to gain venous access in a patient with whom peripheral intravenous access attempts have failed, such a procedure does not comport with the contemporary practice of medical care and is highly unlikely to be selected and performed by a physician practicing in a therapeutic health care setting.

23.

The contemporary practice of medicine usually employs a hollow needle and a wire to secure central intravenous access. This technique is referred to by several terms, including but not limited to "percutaneous central line placement", "percutaneous central access", "percutaneous central venous cannulation", and "percutaneous technique". This technique has, except in rare circumstances, supplanted the use of the cut-down technique. The percutaneous technique is superior to the cut-down technique in virtually all regards. Compared with the cut-down technique, the percutaneous technique is less invasive, less painful, faster, cheaper, and safer. Because of its more widespread use, far more physicians and health care professionals are proficient and competent in performing the percutaneous technique. It would be extraordinarily rare to perform a

central venous cut-down procedure without first attempting, and failing, to successfully obtain intravenous access using the percutaneous technique. In experienced hands the failure rate using the percutaneous technique is extremely low.

24.

Gaining venous access is a medical procedure that is separate from the legal procedure of execution by lethal injection. The State of Alabama's protocol regarding venous access procedures, therefore, should comport with contemporary standards of medical care. To meet contemporary standards of medical care, the protocol should not include a cut-down procedure.

25.

For the reasons described above, in order to approach or meet a medically acceptable standard the execution protocol should explicitly articulate and define the requisite credentials, licensure, training, and experience of the personnel who are scheduled to secure intravenous access. While such definition should apply to all lethal injection procedures, it should in particular apply to lethal injection procedures in which the establishment of intravenous access is expected and foreseen to be challenging and painful.

SO SAYETH AFFIANT.

MARK HEATH

Sworn to and subscribed before me
This 6th day of October, 2003
Lia Pascale
Notary Public
My commission expires: 7/21/07

LIA PASCALE
Notary Public, State of New York
No. 01PA6015971
Qualified in New York County
Commission Expires 7/21/07

Curriculum Vitae

1) Date of preparation: October 6, 2003

2) Name: Mark J. S. Heath

Birth date: March 28, 1960
Birthplace: New York, NY
Citizenship: United States, United Kingdom

3) Academic Training:

	Harvard University	B.A., Biology, 1983
	University of North Carolina, Chapel Hill	M.D., 1987
	Medical License	New York: 177101-1

4) Traineeship:

1987 – 1988 Internship, Internal Medicine, George Washington University Hospital, Washington, DC.

1988 – 1991 Residency, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY

1991 – 1993 Fellowship, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY

5) Board Qualification:

Diplomate, American Board of Anesthesiology, October 1991.

6) Military Service: None

7) Professional Organizations:

American Society of Anesthesiologists
International Anesthesia Research Society
Society of Cardiovascular Anesthesiology

8) Academic Appointments:

1993 – 2002	Assistant Professor of Anesthesiology, Columbia University, New York, NY
2002 - present	Assistant Professor of Clinical Anesthesiology, Columbia University, New York, NY

9) Hospital/Clinical Appointments:

1993 – present Assistant Attending Anesthesiologist, Presbyterian Hospital, New York, NY.

10) Honors:

Magna cum laude, Harvard University
Alpha Omega Alpha, University of North Carolina at Chapel Hill
First Prize, New York State Society of Anesthesiologists Resident Presentations, 1991

11) Fellowship and Grant Support:

Foundation for Anesthesia Education and Research, Research Starter Grant Award, Principal Investigator, funding 7/92 - 7/93, $15,000.

Foundation for Anesthesia Education and Research Young Investigator Award, Principal Investigator, funding 7/93 - 7/96, $70,000.

NiH KO8 "Inducible knockout of the NK1 receptor"
- Principal Investigator, KO8 funding 12/98 - 11/02, $431,947 over three years
(no-cost extension to continue through 11/30/2002)

NIH RO1 "Tachykinin regulation of anxiety and stress responses"
Principal Investigator, funding 9/1/2002 – 8/30/2007
$1,287,000 over 5 years

12) Departmental and University Committees:

Research Allocation Panel (1996 – 2001)
Institutional Review Board (Alternate Boards 1-2, full member Board 3) (2003 - present)

13) Teaching:

Lecturer and clinical teacher: Anesthesiology Residency Program, Columbia University and Presbyterian Hospital, New York, NY

Advanced Cardiac Life Support Training

Invit _ecturer:

NK1 receptor functions in pain and neural development, Cornell University December 1994

Anxiety, stress, and the NK1 receptor, University of Chicago, Department of Anesthesia and Critical Care, July 2000

Anesthetic Considerations of LVAD Implantation, University of Chicago, Department of Anesthesia and Critical Care, July 2000

NK1 receptor function in stress and anxiety, St. John's University Department of Medicinal Chemistry, March 2002

Making a brave mouse (and making a mouse brave), Mt.Sinai School of Medicine, May 2002

Anesthetic considerations of LVAD implantation. Recurrent lecture at Columbia University LVAD implantation course.

14) Grant Review Committees: None

15) Publications:

Original peer reviewed articles

- Santarelli, L., Gobbi, G., **Debs, P.C.**, Sibille, E. L., Blier, P., Hen, R., **Heath, M.J.S.** (2001). Genetic and pharmacological disruption of neurokinin 1 receptor function decreases anxiety-related behaviors and increases serotonergic function. **Proc. Nat. Acad. Scl.**, 98(4), 1912 – 1917.

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- **Heath, M. J. S.**, Dickstein, M. L. (2000). Perioperative management of the left ventricular assist device recipient. Prog Cardiovasc Dis.;43(1):47-54.

- Dickstein, M.L., Mets B, **Heath M.J.S.** (2000). Anesthetic considerations during left ventricular assist device implantation. Cardiac Assist Devices pp 63 – 74.

- **Heath, M. J. S.** and Hen, R. (1995). Genetic insights into serotonin function. **Current Biology** 5.9, 997 -999.

- **Heath, M.J.S.**, Mathews D. (1990). Care of the Organ Donor. **Anesthesiology Report** 3, 344-348.

- **Heath, M. J. S.**, Basic physiology and pharmacology of the central synapse. (1998) **Anesthesiology Clinics of North America** 15(3), 473 - 485.

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09-6821

No. __-____
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

David Larry NELSON,
Petitioner,

v.

Donal CAMPBELL and
Grantt CULLIVER,
Respondent.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

BRIEF IN OPPOSITION TO MOTION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

David Larry Nelson is scheduled to be executed by lethal injection today at 6:00 p.m. Nelson has been on Alabama's death row for more than 20 years. He was sentenced to death for the 1978 murder of Wilson W. Thompson. The murder was made capital because Nelson had "been previously convicted of murder in the first or second degree in the 20 years preceding the crime." Ala. Code § 13A-5-40(a)(10) (1975). Nelson exhausted all of his state and federal court appeals when the Supreme Court of the United States, on March 24, 2003, denied his petition for a writ of certiorari from the decision of the Eleventh Circuit Court of Appeals, affirming the dismissal of his habeas petition. *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002), cert. denied, 123 S. Ct. 1573 (2002).

Three days before his scheduled execution date – set by order of the Alabama Supreme Court on September 3, 2003 – Nelson sought to raise a claim that he, by his own admission, has been fully aware of for at least seven weeks. Demonstrated by "attachment 2" to his complaint, Nelson was aware, at least by August 19, 2003, that due to what he characterized as "severely compromised veins," locating a vein in his lower arms, for the purpose of carrying out the execution, might be problematic. At that time, he was additionally aware that the Warden was unwilling to provide the execution protocol or information regarding the "training" of medical personnel who would be involved in the execution.

(Nelson's complaint, attachment 2) Finally, he was informed of the possibility that a "cutdown" procedure might be utilized if a peripheral vein could not be located. (Nelson's complaint, attachment 2)

The Court of Appeals correctly recognized that characterizing the "cut-down" procedure as a possibility is appropriate, because it will only be considered as a last resort. In other words, it will only be utilized if the medical doctor responsible for connecting the direct intravenous line is unable to otherwise locate a suitable peripheral vein. (Opinion of the Court of Appeals at p. 3, n. 2) Contrary to the assertions Nelson has made throughout these proceedings, therefore, it is unlikely that such a procedure will even become necessary.

As is set forth in the Warden's affidavit (attached to the defendant's motion to dismiss), if the physician is unable to locate a vein in Nelson's lower arms or hands, he will attempt to locate the femoral vein in his groin area. If this fails, the physician will attempt to locate a suitable vein in Nelson's neck. Even Nelson's expert indicates that such steps would be appropriate if, in fact, Nelson has no suitable veins in his lower arms. (See second affidavit of Mark Heath, attached to Nelson's reply to the State's motion to dismiss at paragraph 3) (stating that "[b]ased on David Nelson's history of intravenous drug abuse … and the established lack of visible peripheral veins, it is highly likely that the personnel staffing his execution will be required to place a central line in either the femoral

vein (in the groin), the subclavian vein (behind the clavicle or collar bone), or in one of the jugular veins (in the neck) – the internal or external jugular vein"). Additionally, according to Dr. Heath, connecting a direct intravenous line to a patient's neck area is a fairly routine procedure. Specifically, he refers to the "external jugular vein" as "a commonly-used structure for obtaining intravenous access if peripheral access can not be secured." (second affidavit of Mark Heath at paragraph 8) The Court of Appeals correctly pointed out that Nelson has challenged neither of these procedures. (Opinion of the Court of Appeals at p. 3, n.3)

Despite being fully aware of the factual basis for his claim nearly two months before his scheduled execution date, Nelson waited to file his complaint a mere three days ago. His own actions, therefore, significantly undercut his professed motive for filing his complaint – that he wishes only to question the possible use of a procedure which, according to him, is "easily correctable," but is not otherwise seeking to impede his execution or challenge the validity of his sentence. By sitting on his claim for seven weeks and filing in the afternoon three days before his scheduled execution date, Nelson demonstrated that his goal is not to "correct" an "easily correctable" procedure, but to prevent the State of Alabama from carrying out his sentence.

Further support for this conclusion is Nelson's failure to even attempt to raise his claim in state court. Nelson has not exhausted his claim. He never attempted to raise a claim regarding the method of execution in any state court proceedings. For example, despite his complaints that he has not been provided with a protocol or information regarding the medical personnel who will be involved in his execution, Nelson never sought relief in state court to obtain that information. He did not attempt to file a post-conviction petition under the successive petition rule set forth in Rule 32.2 of the Alabama Rules of Criminal Procedure. Under Rule 32.2(e), the state statute of limitations can be overcome by demonstrating the existence of "newly discovered material facts." Nelson could have, moreover, sought to challenge a decision denying the release of information by the Department of Corrections by filing a petition for a writ of certiorari in the Montgomery County Circuit Court. He did none of these things. Again, his actions demonstrate that his purpose is not merely to alter the execution procedures, but rather to prevent the State of Alabama from carrying out his sentence.[1]

Thus, the Court of Appeals correctly recognized that, despite Nelson's

[1] As of approximately 12:00 p.m. central time today, the statement that Nelson has not sought relief in state court is not entirely accurate. At that time, Nelson filed a "motion to stay execution in the Alabama Supreme Court." Nevertheless it is still correct to state that he never raised, in State court, the claim he is raising here. His request in the Alabama Supreme Court relies upon state law, the Constitution of Alabama.

attempt to "artfully" "label[] his claim," *Spivey v. State Board of Pardons and Paroles*, 279 F.3d 1301, 1302, n 1 (11th Cir. 2002), his "prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) "Because Nelson's § 1983 claim was the "functional equivalent" of a second habeas petition and because Nelson did not get … permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim." (Opinion of the Court of Appeals at pp. 4-5)

STATEMENT OF THE CASE

A. Facts

A few days prior to January 1, 1978, Nelson and his girlfriend, Linda Vice, traveled from Anniston to Birmingham, Alabama. *Nelson v. State*, 511 So. 2d 225, 228 (Ala. Crim. App. 1986). Nelson was armed with a .38 caliber pistol that belonged to Vice's uncle. *Id.* On the evening of December 31, 1977, Nelson and Vice were in the "Red Dog Saloon" where they met James Dewey Cash, a cab driver. *Nelson*, 511 So. 2d at 232. "Cash was going to a party, and he asked [Nelson] and Vice to go with him. They agreed, and the three of them left in Cash's taxicab, with Cash driving." *Id.* "After driving a few blocks, . . . [Nelson]

pulled out the pistol and told Cash to hand over his money." *Id.* When Nelson tried to take Cash's watch, "Cash grabbed the barrel of the pistol and [Nelson] started firing." *Id.*, at 233. "[O]ne bullet hit Cash in the chest, one hit him in the head, and one hit the window." *Id.* Vice and Nelson got out of the cab, leaving Cash's body at the scene. *Id.*

Later the same evening, Nelson and Vice went to another lounge in Birmingham where they met the victim in this case, Wilson W. Thompson. *Id.* at 229. Nelson introduced Vice to Thompson as his sister and said that he and Vice had no way home. *Id.* "Thompson and Nelson discussed going to Thompson's mobile home in Kimberly, which was twenty to thirty miles from Birmingham, and having an 'orgy.'" *Id.* The three of them left the lounge at approximately 1:30 a.m. in Thompson's automobile, arriving at Thompson's home about thirty minutes later. *Id.*

"After entering the mobile home, Thompson fixed everyone a drink . . . [and] Nelson ordered Vice to remove her clothes." *Nelson*, 511 So. 2d at 229. When Vice expressed reluctance, Nelson took her into the bedroom, where he again told her to "take something off." *Id.* As she removed her blouse, Thompson, who was nude, entered the room and told Vice to take off the rest of her clothing. *Id.* She did so and then, in accordance with Nelson's command, lay down on the bed. *Id.* "Nelson then told Thompson he could have oral sex with Vice [and, just

as Thompson began to do so,] Nelson shot him in the back of the neck at close range with the .38 caliber pistol." *Id.*

"The bullet apparently passed through Thompson's neck and wounded Vice in the upper part of her leg." *Id.* When Vice arose and started screaming, Nelson shot her twice; "one bullet wound[ed] her in the wrist and the other graz[ed] the back of her head." *Id.* Nelson then hit Thompson in the back of the head with the pistol and began to "ransack" the mobile home. *Id.* "Nelson returned to the bedroom and, upon finding Vice alive, displayed his penis and tried to get Vice to perform oral sex upon him." *Id.* When she refused, "Nelson threw a blanket over her and walked out." *Id.*

Vice was able to make her way to a neighboring mobile home where she was let inside and the authorities were called. *Nelson*, 511 So. 2d at 229. She eventually received treatment and survived her gunshot wounds. Thompson, whose nude body was discovered by police lying face down on the bed, was not so fortunate. *Id.* Nelson was subsequently apprehended in Tennessee in possession of Thompson's car and some of Thompson's personal belongings. *Id.* at 230. In addition, he was carrying a .38 caliber pistol that was later determined to be the gun that had fired the bullet found on Thompson's bedroom floor and was matched to a projectile removed from Vice's leg. *Id.*

B. Procedural History

Nelson "was initially indicted for the capital offense of murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts. Ala. Code § 13-11-2(a)(10) (1975)." *Nelson v. State*, 511 So. 2d 225, 227 (Ala. Crim. App. 1986). The two intentional murders alleged in the indictment were that of James Dewey Cash and Wilson W. Thompson. *Id.* Pursuant to an agreement between the State and Nelson, the initial indictment was nol prossed and Nelson instead received two separate capital murder indictments: one for killing James Dewey Cash while robbing him, and the other for killing Wilson W. Thompson after having been convicted of murder in the second degree within the preceding twenty years. *Id.* at 227-28.

Nelson was first convicted of the capital murder of James Dewey Cash and sentenced to death. *Nelson v. State*, 405 So. 2d 392 (Ala. Crim. App. 1980). That conviction and sentence were subsequently reversed on the authority of *Beck v. Alabama*, 447 U.S. 625 (1980). *Nelson v. State*, 405 So. 2d 401 (Ala. 1981). "Nelson was tried again and on November 27, 1982, found guilty of the robbery and murder of Cash. He was sentenced to life imprisonment in the penitentiary. *Nelson*, 452 So. 2d 1367 (Ala. Crim. App.), cert. denied, 452 So. 2d 1367 (Ala. 1984)." *Nelson v. State*, 511 So. 2d 225, 228 n. 1 (Ala. Crim. App. 1986).

The murder for which Nelson is currently under a sentence of death is that of Wilson W. Thompson.[2] "Nelson was first tried for this offense in October 1978, found guilty as charged in the indictment, by jury verdict, and sentenced to death by the trial court." *Id.* at 228. That conviction, however, was reversed by the Alabama Court of Criminal Appeals "on mandate of *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), on remand, 396 So. 2d 645 (Ala. 1981), and *Ritter v. State*, 403 So. 2d 154 (Ala. 1981)." *Nelson v. State*, 405 So. 2d 50 (Ala. Crim. App. 1981).

Nelson's second trial for the murder of Wilson W. Thompson also resulted in a conviction of capital murder. Nelson v. State, 511 So. 2d 225, 228 (Ala. Crim. App. 1986). "After a separate sentencing hearing, and by unanimous decision, the jury fixed his punishment at death. The trial court then held a second sentencing hearing . . . and on April 2, 1982, sentenced Nelson to death, thereby accepting the death penalty as recommended by the jury." Id. Nelson's conviction and sentence were affirmed by both this Court and the Alabama Court of Criminal Appeals. Nelson v. State, 511 So. 2d 225 (Ala. Crim. App. 1986), aff'd, 511 So. 2d 248

[2] As noted, Nelson was convicted of "murder committed by a defendant who has been convicted of murder in the first or second degree in the twenty years preceding the crime." The underlying murder was that of Oliver King. See Nelson v. State, 278 So. 2d 734 (Ala. Crim. App. 1973). Nelson's original conviction for the murder of King was reversed and remanded for a new trial. Id. Rather than being retried for the offense, Nelson pleaded guilty and was sentenced to twelve years in the penitentiary. Nelson v. State, 511 So. 2d 225, 228 (Ala. Crim. App. 1986).

(Ala. 1987). A petition for a writ of certiorari was subsequently denied by this Court. *Nelson v. Alabama*, 486 U.S. 1017 (1988).

Following the failure of his direct appeal, Nelson filed, in the Circuit Court of Jefferson County, a petition for relief from conviction and sentence of death pursuant to Temporary Rule 20 of the Alabama Rules of Criminal Procedure.[3] *Nelson v. Nagle*, 995 F.2d 1549, 1552 (11th Cir. 1993). "Judge Pearson denied Nelson's petition, and Nelson and the State entered into an agreement whereby Nelson would forego direct appeal of the rule 20 petition and instead petition the federal courts for a writ of habeas corpus under to 28 U.S.C. § 2254." *Nelson*, 292 F.3d at 1293-94.

Nelson accordingly filed a petition for habeas corpus relief in the United States District Court for the Northern District of Alabama. That court denied the petition as to Nelson's conviction, but granted relief as to his sentence of death. *Nelson v. Nagle*, No. CR-90-PT-26835 (N.D. Ala. Aug. 19, 1991). The Court of Appeals for the Eleventh Circuit affirmed that decision, holding that "the prosecutor's improper use of the *Eberhart [v. State*, 47 Ga. 598 (1873)] quote, suggesting that judicial authority discourages consideration of mercy in capital cases, rendered the sentencing phase of Nelson's trial fundamentally unfair." *Nelson v. Nagle*, 995 F.2d 1549, 1558 (11th Cir. 1993).

[3] Temporary Rule 20 is now Rule 32 of the Alabama Rules of Criminal Procedure.

In accordance with the judgment of the court of appeals and the District Court for the Northern District of Alabama, Nelson's case was presented to a jury for re-sentencing. "The jury returned a recommendation that Nelson receive the death penalty, and Judge Pearson sentenced Nelson to death." *Id. Nelson v. Alabama*, 292 F.3d 1291, 1294 (11th Cir. 2002). The resulting death sentence was subsequently affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme. *Nelson v. State*, 681 So. 2d 257 (Ala. Crim. App. 1996); *In re Nelson*, 681 So. 2d 260, 262 (Ala. 1996).

On October 23, 1996, the Alabama Supreme Court set a December 6, 1996, execution date for Nelson. Subsequently, however, on December 5, 1996, Nelson was granted a temporary stay of that execution on the ground that Nelson's brother was critically ill and in need of a kidney transplant, which Nelson could possibly provide. After it became clear that a transplant was not feasible, the State filed a Motion To Lift Temporary Stay Of Execution And To Reset Execution Date on February 25, 1997. An execution date was set for April 18, 1997.

On April 14, 1997, Nelson filed a Motion for Stay of Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Alabama, challenging his 1996 death sentence. Because the petition raised claims attacking Nelson's 1994 re-sentencing proceedings, which had not been the subject of a previous federal habeas corpus petition, the State did

not oppose a stay of execution and represented this position to the district court. On July 24, 2000, after considering the claims raised by Nelson in the habeas petition, Judge Robert B. Propst entered an order of dismissal and a memorandum opinion denying the relief sought. That determination was subsequently affirmed by the Eleventh Circuit Court of Appeals. *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002). On December 11, 2002, Nelson filed a petition for a writ of certiorari in this Court. The petition was denied on March 24, 2002.

On April 4, 2003, the State of Alabama moved the Alabama Supreme Court to set an execution date for Nelson. Shortly thereafter, counsel for the State received a letter from Nelson in which he represented that his attorneys would not respond to the motion or "seek a stay of execution [on his] behalf." (See correspondence from Nelson attached to State's Motion to Dismiss filed in the district court) He additionally requested that any possible steps be taken to insure that an execution date was set expeditiously. (Id.) On September 3, 2003, the Alabama Supreme Court set Nelson's execution for October 9, 2003.

More than two weeks before the issuance of the death warrant, and nearly two months before the execution date, counsel for Nelson expressed concerns to Warden Culliver "about the lethal injection procedure due to the fact that he [Nelson] has severely compromised veins." (See "Attachment 2" to Nelson's complaint). Counsel also relayed an understanding that Warden Culliver would

not provide a "written protocol regarding execution procedures" or any information regarding the personnel who would be carrying out the execution. (Id.) Finally, the possibility of a "cutdown" procedure was discussed between the Warden and counsel for Nelson. (Id.) Thus, despite being fully aware of the basis for the current claim more than seven weeks before the execution date, Nelson waited until three days before his scheduled execution to file his complaint.

In response to the concerns raised, the State had Nelson examined by medical personnel to determine whether he did, in fact, have compromised veins in his lower arms due to extensive intravenous drug use. (See affidavit of Warden Culliver attached to the State's motion to dismiss) Upon discovering that locating a vein in Nelson's lower arms might be problematic, Warden Culliver sought to find medical personnel who could attach a direct intravenous line in another manner. As is reflected in his affidavit, Warden Culliver located a physician who will attach the line, should it become necessary, to a vein located somewhere other than Nelson's lower arms. (Affidavit of Warden Culliver)

Nelson filed his complaint on the afternoon of Monday, October 6, 2003. Nelson's execution is scheduled to take place on October 9, 2003, at 6:00 p.m. central time. Upon receiving the complaint, the district court contacted the parties and set up a conference call for 8:30 a.m. on October 7, 2003. During the proceedings, the State gave notice of its intent to file a motion to dismiss on the

basis of a lack of jurisdiction. That motion was subsequently filed shortly after 12:00 p.m. central time that same day. Nelson filed a response to the motion to dismiss at approximately 3:25 p.m. central time. The district court issued an order granting the State's motion to dismiss shortly after 5:00 p.m.

The district court determined that Nelson's complaint was the "functional equivalent" of an habeas corpus petition and, therefore, was subject "to the limits imposed on successive petitions in 28 U.S.C.A. § 2244." *Nelson v. Campbell*, No. 03-T-1008, opinion at p. 7, citing *Fugate v. Dep't of Corr.*, 301 F.3d 1287, 1288 (11th Cir. 2003); *Spivey v. State Bd. Of Pardons and Parole*, 279 F.3d 1301, 1303 (11th Cir. 2002); *Hill v. Hopper*, 112 F.3d 1088, 1088-89 (11th Cir. 1997); *Felker v. Turpin*, 101 F.3d 95, 96 (11th cir. 1996). Thus, the district court held that "[b]ecause Nelson did not first apply to [this Court] for approval to file a second habeas petition, [it] did not have jurisdiction to hear his claim." *Id.* at 10, citing *Fugate*, 301 F.3d at 1288, and *Spivey*, 279 F.3d at 1303.

The Court of Appeals for the Eleventh Circuit affirmed the determination of the district court that Nelson's complaint was due to be dismissed for lack of jurisdiction. More specifically, the Court of Appeals, like the district court, deemed Nelson's complaint the "functional equivalent" of a successive habeas petition. The Court found that "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to

accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) Judge Wilson dissented, stating that "Nelson's request for a stay has no bearing on his conviction or his sentence" and, therefore, his "§ 1983 action should be allowed to proceed." (Opinion of the Court of Appeals at p. 11) Rehearing en banc was subsequently requested and denied.

On the afternoon of his scheduled execution, Nelson filed, in this Court, a petition for a writ certiorari seeking review of the decision of the Court of Appeals. This brief in opposition to that petition follows.

REASONS FOR DENYING THE STAY MOTION AND THE CERTIORARI PETITION

I. The Court of Appeals and the District Court Both Correctly Construed Nelson's § 1983 Complaint as a Successive Petition Subject to The Restrictions of 28 U.S.C. § 2244.

Nelson's complaint, purportedly brought pursuant to 42 U.S.C. § 1983, seeks to obtain relief from this Court "enjoin[ing] and restrain[ing] the defendants from executing him until they take certain measure to minimize the risk of unnecessary pain, suffering and mutilation during the execution process." *Fugate v. Department of Corrections*, 301 F.3d 1287, 1288 (11th Cir.), cert. and motion for stay denied, 536 U.S. 980 (2002). Because this complaint "constitutes the functional equivalent of a second habeas petition, … [this] court lack[s] jurisdiction to consider [Nelson]'s claim because he ha[s] not applied … for

permission to file a successive application." *Id.* at 1288 (internal citations and quotation marks omitted), citing 28 U.S.C. 2244(b)(3)(A). This determination, arrived at by both the district court and the Court of Appeals, is correct. Nelson's petition for a writ of certiorari should, therefore, be denied.

In *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996), the Court of Appeals held that a prisoner may not circumvent the rules regarding second or successive habeas petitions by filing a § 1983 claim. Similar to Nelson's complaint, the plaintiffs, in *Felker*, challenged the constitutionality of Georgia's method of execution on Eighth Amendment grounds. *Id.* at 96. The Court of Appeals, "[g]uided by *Gomez v. United States District Court*, 503 U.S. 653 (1992), as interpreted by *Lonchar v. Thomas*, 517 U.S. 314 (1996), … conclude[d] that [the] § 1983 claim [was] subject to the procedural requirements for bringing a second or successive habeas claim." *Id.* Thus, on the basis of the decisions of this Court, the Court of Appeals determined that "the district court was without authority to consider [the] request for relief." *Id.*; see also *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997) ("As Hill's § 1983 cruel and unusual punishment claim constitutes the 'functional equivalent' of a second habeas petition, the district court was subject to the law applicable to successive habeas petitions."), citing *Felker*, 101 F.3d at 96.

The Court of Appeals for the Eleventh Circuit has reached that same conclusion in a number of other cases. See *Fugate*, *supra*; *Spivey v. State Bd. of*

Pardons and Paroles, 279 F.3d 1301 (11th Cir. 2002); *Gilreath v. State Board of Pardons & Paroles*, 273 F.3d 932 (11th Cir. 2001). For example, as noted by the court below, the facts of *Fugate*, are not distinguishable from those presented here: "The plaintiff in *Fugate* asserted, among other challenges to the State of Georgia's lethal injection procedure, that the use of a 'cut-down' procedure in the absence of a suitable vein violated the Eighth and Fourteenth Amendments." (Opinion of the Court of Appeals at p. 4), citing Compl. For Injunctive Relief and Decl. J., filed Aug. 12, 2002, ¶¶ 24-28, *Fugate v. Dep't of Corrs.*, No. 02-02219-CV-CC (N.D. Ga. Aug. 13, 2002). "In short, [in] both cases, [the plaintiffs] sought to 'enjoin … the defendants from executing [them] *until* they take certain measures to minimize the risk of unnecessary pain.'" (Opinion of the Court of Appeals at p. 6, n. 4) (emphasis in original), quoting *Fugate*, 301 F. 3d at 1288. Following the decision of the Court of Appeals, this Court subsequently denied Fugate's petition for a writ of certiorari and an accompanying motion for a stay of execution. 536 U.S. 930.

Other circuits, have also resolved this issue in a manner consistent with the opinions above. For example, in *Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997), the Eighth Circuit Court of Appeals considered a complaint, brought under § 1983, "challenging the constitutionality of death by electrocution in general and, more specifically, the constitutionality of the particular method by which Nebraska allegedly administers the electrical current for electrocutions." The claim was

rejected on the basis that "the district court correctly determined that Williams' current complaint is the functional equivalent of a successive habeas action, regardless of its technical label." *Id.* at 336.

Additionally, in *McQueen v. Patton (In re Sapp)*, 118 F.3d 460 (6th Cir. 1997), the Sixth Circuit Court of Appeals rejected a § 1983 "claim[] that Kentucky's use of electrocution to carry out a death sentence constitutes cruel and unusual punishment." The Court noted that "[a]lthough McQueen claims that he is not challenging the constitutionality of the death penalty itself but only 'a condition of confinement,' we believe that this challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus." *Id.* at 462. The Court "follow[ed] the clear holding of *Gomez*, as endorsed by the Eleventh Circuit, that a challenge to the method of execution, whatever denominated … is to be treated as a habeas petition." *Id.* at 464; see also *Moody v. Rodriguez*, 164 F.3d 893, 894 (5th 1999) (holding that the Court "lack[ed] jurisdiction to consider Moody's § 1983 action, the only purpose of which is to delay his imminent execution").

Contrary to Nelson's claim, there is no true split among the circuits regarding this issue. For example, he relies on *Sullivan v. Dugger*, 721 F.2d 729 (11th Cir. 1983) as an example of conflicting authority. In *Sullivan*, the Court was presented with a claim by telephone apparently hours before a scheduled execution

without input by a state attorney. *Sullivan*, 721 F.2d at 720. The Court, without any apparent consideration of the issue presented here, announced its ruling by telephone that the claim was without merit. *Id.* Nelson also relies on the opinion of the Ninth Circuit in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996). That judgment was, however, subsequently vacated by this Court. 519 U.S. 918 (1996). Nelson has simply not provided a court of appeals decision wherein a petitioner attacking the constitutionality of the method of execution, and seeking to stay that execution, were the court addressed the issue and concluded that a § 1983 action was proper.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that an inmate cannot bring a § 1983 action that would "necessarily imply the invalidity of his conviction or sentence" unless he proves that his "conviction or sentence has already been invalidated." *Id.* at 486-87. Here, "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) His complaint was, therefore, properly construed as the "functional equivalent" of a successive habeas petition.[4] "Because [Nelson] failed to apply for

[4] As was pointed out previously, Nelson's contention that he is not seeking a stay for the purpose of impeding his sentence, but out of concern for specific procedures which may be utilized should be viewed with a high degree of skepticism. As noted previously, Nelson, by his

permission to file a second habeas petition as required by 28 U.S.C. § 2244 (b)(3)(A), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, tit. I (1996), the District Court was without authority to consider their request for relief." *Felker*, 101 F.3d at 96.

This conclusion is further supported by the rule of exhaustion. Nelson has not exhausted his claim. He never attempted to raise a claim regarding the method of execution in state court. For example, despite his complaints that he has not been provided with a protocol or information regarding the medical personal who will be involved in his execution, Nelson never went to state court for assistance in obtaining that information.

Although no concession is made that Nelson's claim would have been viable in state court, the point is that Nelson never made the attempt. Under Rule 32.2 of the Alabama Rules of Criminal Procedure, the rule governing post-conviction procedures, a "second or successive petition on different grounds" is permissible if "the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will

own admission, was aware of the full factual basis for his claim a minimum of seven weeks before the scheduled execution date. (See attachment 2 to the complaint) Yet, he waited to file his complaint until a mere three days ago. Such behavior seems inconsistent with Nelson's professed motive of merely questioning the possible use of a procedure which, according to him, is "easily correctable."

result in a miscarriage of justice." Moreover, the state statute of limitations, set forth in Rule 32.2(c), can be overcome by demonstrating the existence of "newly discovered material facts." Rule 32.1(e), Ala. R. Crim. P. Nelson could have, moreover, sought to challenge a decision denying the release of information by the Department of Corrections by filing a petition for a writ of certiorari in the Montgomery County Circuit Court. See *Pinkard v. State*, 2003 WL 1414618, at *1 (Ala. Crim. App. Mar. 21, 2003) (recognizing that "[a] petition for a writ of certiorari is the proper vehicle for challenging the administrative decision of a state agency").

The doctrine of exhaustion "is rooted in considerations of federal-state comity." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973). As this Court is well aware, it is extremely significant in the context of the law governing habeas corpus proceedings. "It would wholly frustrate explicit congressional intent to hold that [Nelson] could evade this requirement by the simple expedient of putting a different label on [his] pleadings." *Id.* at 489-90.

Finally, based on the this Court's decision in *Gomez v. United States District Court*, 503 U.S. 653 (1992), Nelson's complaint is due to be dismissed regardless of "[w]hether his claim is framed as a habeas petition or as a § 1983 action." *Id.* at 654. In either case, Nelson seeks an "equitable remedy" and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and

[the petitioner's] obvious attempt at manipulation. ... There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Id.* at 654. This Court "may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*; see also *Lonchar v. Thomas* 517 U.S. 884 (1996) (explaining *Gomez* as holding that the habeas rules do apply to a last minute § 1983 method of execution claim). As noted previously, despite his contention that he does not challenge the validity of his sentence and only wishes to litigate the possible use of a particular procedure, Nelson held his complaint for nearly two months, waiting to spring it upon the State and the courts at the "eleventh hour." The obviously conclusion is that he likely did so to better his chances for obtaining a stay of execution.

In conclusion, it is simply illogical for one to state that a challenge to the procedures which may be necessary to gain venous access is not a challenge to the execution itself. This is a distinction without a difference. In order to carry out Nelson's lawfully imposed sentence via the legally mandated method of lethal injection, the medical personnel must connect a direct intravenous line to Nelson. Challenging the procedures necessary to do so is a challenge to the execution itself. Moreover, as noted previously, the steps to be taken are reasonable and will be conducted by trained medical personnel, including a medical doctor. The sole

basis for Nelson's eleventh hour claim, the "cut-down" procedure, will most likely not even be utilized. As the Court of Appeals correctly noted, "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) This Court should similarly reject Nelson's attempt to skirt the successive petition rules by placing a § 1983 label on his constitutional challenge to the method of execution.

II. The Claim Set Forth In Nelson's Complaint Is Insufficient To Warrant A Stay Of Execution.

Nelson contends that his execution will violate the Eighth Amendment because state officials will to execute him by connecting an intravenous line in a location other than his lower arms or hands. Although Nelson's request for a stay of execution should be denied because the successive petition rules bar the consideration of his claim. Nelson should also be denied a stay of execution because he has not established "substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

As the federal district court correctly noted, "[t]he Eleventh Circuit has held that when a prisoner brings an action under § 1983 that is the 'functional equivalent' of a habeas corpus petition, the § 1983 action is to be treated as a habeas corpus petition and subjected to the limits imposed on successive petitions

in 28 U.S.C. § 2244." *Doc. 14 at 7.* To overcome this bar, Nelson must demonstrate that his claim is based upon a retroactively applicable new rule of constitutional law or that the factual predicate of his claim could not have been previously discovered and that such claim establishes he is not guilty. 28 U.S.C. §§ 2244(b)(2)(B), 2244(b)(2)(B)(i), (ii). Nelson does not attempt to establish either provision. His request for a stay of execution should, therefore, be denied.

Even if Nelson's claim was not barred under the successive petition rules, he has not established the heavy burden for this Court to grant a stay of execution. This Court, in denying a stay of execution presented in a successive petition before the enactment of AEDPA, stated that "[a] stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted.'" *Delo v. Stokes*, 495 U.S. 320, 321 (1990), quoting *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). In another pre-AEDPA case, the Eleventh Circuit stated that, to grant a stay a execution, a federal court must apply a four-part test: "whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest." *Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987). Even if these pre-AEDPA stay cases are applicable, Nelson has not made a substantial showing of the denial of a federal

constitutional right. His request for a stay of execution should, therefore, be denied.

The relevant facts demonstrate that, based upon concerns expressed by Nelson's attorneys, Alabama state officials are prepared to connect an intravenous line in a location other than Nelson's lower arms or hands. Warden Culliver's affidavit states that in late August, Victoria Smith, one of Nelson's attorneys, stated that Nelson's vein structure was poor in his lower arms and hands due to intravenous drug use. *Culliver's affidavit at paragraph 2*. The Warden states that Smith even brought up the possibility of whether Nelson could be executed because she believed it would be difficult to find a vein for the purpose of carrying out the execution by lethal injection. *Id.* Based upon these concerns, the Warden had Nelson examined by a nurse who informed him that it may be difficult to find a vein in Nelson's lower arms or hands to support a direct intravenous line because of Nelson's IV drug use. *Id.*

Because of these facts, the Warden took steps to see that the execution could be carried out by connecting an intravenous line to another part of Nelson's body. *Culliver's affidavit at paragraph 4*. Warden Culliver contacted a physician who has agreed to perform any procedures necessary to connect a direct intravenous line. *Id.* The physician will first attempt to connect a direct intravenous line to the femoral vein located in the groin. *Id.* If this procedure is unsuccessful, the

physician will attempt to attach a direct intravenous line to the jugular vein located in the neck.[5] Even Dr. Heath, who has submitted two affidavits on behalf of Nelson and has testified for other death row inmates on lethal injection issues,[6] states that the jugular vein is "a commonly-used structure for obtaining intravenous access if peripheral access cannot be secured." (*Dr. Heath's Second Affidavit at paragraph 8*) Only if the two previously defined procedures are not successful, will the physician give Nelson a local anesthetic and make a two inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. *Id.* Thus, the Warden's affidavit demonstrates that state officials reacted to Nelson's attorneys concerns by obtaining a physician to perform any necessary procedures to attach a direct intravenous line.

Nelson apparently believes that it is an Eighth Amendment violation to attach an intravenous line in any location other than Nelson's lower arms or hands. The evidence that accompanied the filings in the lower court, demonstrate that state officials took necessary steps to be able to connect an intravenous line to a place other than Nelson's lower arms or hands. Nelson cannot establish the deprivation of a constitutional right merely because he has compromised the veins

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[5] This vein was mislabeled in the affidavits and some of the previous pleadings as the "carotid vein."

[6] See New York Times, Lethal Injection Drug May Be Deceptive, October 7, 2003. (Referring to Dr. Mark Heath's testimony supporting death row inmate's claim that lethal injection, Tennessee's method of execution, violates the Eight Amendment).

in his lower arms and hands due to his intravenous drug use and other veins have to be accessed to accomplish the execution.

A stay pending disposition of a petition for writ of certiorari should be granted only when there are "substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1993). There "must be a reasonable probability that four members of this Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction," and "there must be a significant possibility of reversal of the lower court's decision." *Id.* These conditions do not exist. Thompson does not currently have any post-conviction proceeding pending in any court for this Court to review by means of certiorari. Furthermore, the issues that he attempts to raise in his petition are meritless and unworthy of certiorari review. His motion for a stay and his petition for certiorari should therefore be denied.

CONCLUSION

Based upon the preceding legal authority and argument, this Court should deny Nelson's petition for a writ of certiorari and his motion for a stay of execution.

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CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL
and
GRANTT CULLIVER,
Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

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CITATIONS TO THE RECORD

Citations to the record will be as follows:

Transcript of In-chambers Telephone Conference conducted by the United States District Court for the Middle District of Alabama on October 7, 2003 (T:appropriate page number);

Record in the District Court (D appropriate docket sheet number:appropriate page number);

Attachments to the Petitioner's Petition for Writ of Certiorari (A appropriate attachment number: appropriate page number); and

Respondent's Brief in Opposition (RB:appropriate page number).

ARGUMENT AND AUTHORITY

I. INTRODUCTION

In their Brief in Opposition, the Respondents blame the Petitioner for waiting so long to challenge the medical procedure that the Respondents intended to perform upon the Petitioner to gain venous access in order to execute the Petitioner by lethal injection. (RB:1). The delay is properly attributable to the Respondents because the Respondents misled the Petitioner concerning the time at which the medical procedure would be performed and only informed the Petitioner of the true time that the medical procedure would be performed six days prior to the date of the Petitioner's scheduled execution.

When the Petitioner had first expressed concerns about the Respondents' ability to gain venous access, he had been assured by the Respondents that the situation was under control and that venous access would be accomplished in a relatively simple procedure which would occur twenty-four hours prior to the Petitioner's scheduled execution. (T:9,12,23). Since the Petitioner would have visitation with family and friends following that procedure, the Petitioner believed that the Respondents were acting in good faith and that their representations were true. (T:24).

On Friday, October 3, 2003 - - six days prior to the date of the Petitioner's scheduled execution - - Respondent Culliver

met with the Petitioner and for the first time informed the Petitioner that the medical procedure would occur one to two hours prior to the execution and that the Petitioner would have no visitation following the medical procedure. (T:9,24). As a result of this meeting, the Petitioner no longer believed that the Respondents were acting in good faith or that the Respondents' previous representations were true. (T:24). Rather, the Petitioner concluded that the Respondents were planning to cut and surgically explore his body in multiple locations until they were able to gain suitable venous access. (T:24).

The next business day, Monday, October 6, 2003, the Petitioner filed an action pursuant to 42 U.S.C. §1983. In that action, the Petitioner did not challenge the validity of his conviction or sentence but merely asserted that the Respondents' proposed medical procedure included a cut-down procedure that would entail the mutilation of his body and that there was an alternative procedure that the Respondents could utilize that would not entail the mutilation of his body, namely the percutaneous central line placement procedure. The Petitioner requested that the Respondents not utilize the procedure that involved mutilation of his body and instead utilize the alternative procedure that did not.

In addressing the Petitioner's §1983 action, the district

court stated that the Respondents had offered no explanation as to why they intended to use the cut-down procedure that would involve mutilation rather than the percutaneous central line placement procedure that would not. (D13:5-6). In finding that precedent from the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") required the Petitioner's action to be dismissed for lack of jurisdiction, the district court stated, "It would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment rights. However, as the law now stands, that is, absent a change by either the Eleventh Circuit or the United States Supreme Court, no such relief seems to be available." (D13:13).

By a vote of two to one, a panel of the Eleventh Circuit affirmed the district court's dismissal. In dissent, Judge Wilson stated, "The 'cut down' procedure that is to be used in his execution is not within Alabama's execution procedure nor has it been reviewed to ensure that it passes muster under the Eighth Amendment. Nelson merely requests that a different, more humane procedure known as 'percutaneous central venous cannulation' be used to carry out his execution, rather than the outmoded and painful 'cut-down' procedure. Regardless of which procedure is used, Nelson will be executed by lethal injection in accordance with his sentence." (A11:9-10). According to

Judge Wilson, "An avenue for review of Eighth Amendment claims must remain available to those facing death at the hands of the state." (A11:9 fn. 8).

In its Brief in Opposition, the Respondents completely ignore the substantive underlying issue in the Petitioner's case, the substantive underlying issue being the rationale for the Respondents' insistence on using an outmoded cut-down procedure to gain venous access which will entail mutilation of the Petitioner's body instead of using the percutaneous central line placement procedure which would not entail mutilation of the Petitioner's body. Notably, the Respondents in their brief never mention the percutaneous central line placement procedure.

This Court should grant the Petitioner's Petition for Writ of Certiorari because:

(1) Under this Court's precedent, there is no doubt that the Petitioner has raised one of the most basic constitutional rights, namely, his right not to be the subject of a medical procedure that involves mutilation of his body; and

(2) This Court should resolve the split among the circuits and address the important question of federal law concerning the viability of a 42 U.S.C. §1983 action brought by a death row inmate who has completed his federal habeas corpus proceedings and is not challenging his conviction or sentence.

It is respectfully submitted that the Petitioner's case

provides this Court with the opportunity to address this important question of federal law and resolve the split among the circuits.

II. THE MEDICAL PROCEDURE THAT THE RESPONDENTS PLAN TO PERFORM ON THE PETITIONER IS NOT WITHIN ALABAMA'S EXECUTION PROCEDURE AND CLEARLY VIOLATES THE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Based upon the litigation in the Petitioner's case as of this date, there is no doubt that the Petitioner should have a forum in federal court where the medical procedure proposed by the Respondents can be scrutinized. As Judge Wilson stated in his dissent in the Eleventh Circuit, the procedure at issue in the Petitioner's case "had never before been implemented in Alabama and prison officials had to craft a special procedure to govern Nelson's execution." (A11:7 fn. 6). Significantly, Judge Wilson also noted that "The 'cut down' procedure that is to be used in his execution is not within Alabama's execution procedure… ". (A11:9-10).

It is respectfully submitted that the Respondents' conduct in the Petitioner's case can only lead to one conclusion. That conclusion is that the Respondents are not proceeding pursuant to any written protocol and that they will mutilate the Petitioner if they are allowed to implement their proposed medical procedure.

There is no question that the procedure that the

Respondents intend to perform on the Petitioner is a medical procedure. It is also clear that the Respondents are not following a specific protocol designed by qualified medical personnel. Finally, neither of the Respondents are qualified to design the appropriate medical procedure necessary to obtain venous access prior to the Petitioner's execution by lethal injection.

In support of the Petitioner's contention that the Respondents are proceeding in an unconstitutional and incompetent manner, the Petitioner in the district court submitted an affidavit from a Board certified anesthesiologist, Dr. Mark Heath. In response to Dr. Heath's affidavit, the Respondents relied upon the advice of Dr. Marc Sonnier, an obstetrician and gynecologist, and submitted an affidavit from Dr. Sonnier. (See Alabama Board of Medical Examiners website for Dr. Sonnier's Primary Specialty listing at www.albme.org).

Tellingly, Dr. Sonnier in his affidavit approved of gaining venous access through the "external carotid vein located in the neck"; described the "external carotid vein" in detail; and claimed to have gained venous access through the "external carotid vein" "8-10 times" throughout his twenty-two year career. (D4:Attachment of Dr. Marc Sonnier at Paragraphs 1 and 3). The "external carotid vein" does not exist in human beings.

(D11:Attachment of Dr. Mark Heath at Paragraph 5).[1]

The Respondents have acknowledged that they have never had to perform a medical procedure on an inmate to gain venous access prior to the inmate's execution by lethal injection. The Respondents' actions and assertions support the conclusion that the Respondents are not following any written protocol regarding the requisite medical procedures to be performed on the Petitioner to gain venous access. Rather, the Respondents, neither of whom is a licensed physician, appear to be "making up" medical procedures without consulting a competent, qualified, and credentialed physician.

The result of this collaboration is a planned medical procedure that undoubtedly violates the Petitioner's rights under the Eighth and Fourteenth Amendments. While the Respondents attempt to minimize the likelihood that a cut-down procedure will be necessary to gain venous access to the Petitioner, there can be no disagreement that the cut-down procedure may be necessary. This procedure will involve the mutilation of the Petitioner's body. Specifically and as described by the district court, "The procedure 'involves making a series of surgical incisions through the skin, … underlying

[1] Dr. Sonnier also, despite specializing in the field of obstetrics and gynecology, failed to properly describe the location of the femoral vein as being in the groin area, instead asserting that the femoral vein was located in the thigh. (D13:3,4).

connective tissue, … layers of fat, [and] … layers of muscle, until the region surrounding a large vein is reached.' Such a procedure entails numerous risks (such as severe hemorrhage, extreme pain, cardiac arrest and asphyxia), and therefore should only be performed by a specialist." (D13:5).[2]

It is respectfully submitted that the conduct of the Respondents in the Petitioner's case and the proposed medical procedure that involves mutilation of the Petitioner's body constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. See e.g., Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976).

In its Brief in Opposition, the Respondents failed to address the caselaw concerning the Eighth and Fourteenth Amendments cited by the Petitioner in his Petition for Writ of Certiorari.

The purpose of actions brought pursuant to 42 U.S.C. §1983 is to provide citizens with a vehicle to vindicate their federal

[2] The Respondents in the affidavits of Warden Culliver and Dr. Marc Sonnier have outlined a three-stage procedure for gaining venous access to the Petitioner, with the cut-down procedure being listed as the third stage. It appears that none of these procedures is pursuant to any written protocol and all of the procedures as described in the affidavits arguably implicate the Petitioner's rights under the Eighth and Fourteenth Amendments. The Petitioner has focused on the cut-down procedure in this brief because it is a reasonable assumption based upon the representations made by the Respondents throughout the litigation of the Petitioner's §1983 action that the Respondents intend to utilize the cut-down procedure on the Petitioner.

constitutional rights. The Petitioner's case raises the most basic constitutional right and his action pursuant to §1983 should have been allowed to proceed.

III. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AND ADDRESS THE IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE VIABILITY OF A §1983 ACTION BROUGHT BY A DEATH ROW INMATE WHO HAS COMPLETED HIS FEDERAL HABEAS CORPUS PROCEEDINGS AND IS NOT CHALLENGING HIS CONVICTION OR SENTENCE.[3]

In its Brief in Opposition, the Respondents attempt to minimize the significance of the question of federal law in the Petitioner's case and have asserted that "there is no true split among the circuits" regarding the treatment of §1983 actions by death row inmates after the completion of their federal habeas corpus proceedings. (RB:18).

It is respectfully submitted that this Court has clearly indicated that issues such as the §1983 issue presented in the Petitioner's case raise important questions of federal law that should be addressed. Additionally, it is clear that the circuits are split with respect to the §1983 issue in the Petitioner's case and that this split should be resolved by this

[3] As an initial matter, the Respondents in their Brief in Opposition assert that the Petitioner has not exhausted his claim filed pursuant 42 U.S.C. §1983. (RB:4). However, as this Court held in Edwards v. Balisok, 520 U.S. 641,649 (1997), there is no exhaustion requirement with respect to actions filed pursuant to §1983.

Court.[4]

The Petitioner's case raises an important question of federal law. The question is, in light of the AEDPA, are all actions filed by death row inmates in federal court subsequent to the inmates' federal habeas corpus proceedings to be treated as successive habeas petitions under 28 U.S.C. §2244(b)? This question can arise in a number of different contexts. It can

[4] This Court in Gomez v. United States District Court for the Northern District of Alabama, 503 U.S. 653 (1992) addressed the propriety of a §1983 claim raised by a death row inmate challenging execution by lethal gas as being cruel and unusual punishment in violation of the Eighth Amendment. In denying the petitioner in Gomez relief, this Court emphasized (1) that the petitioner had filed four previous federal habeas corpus petitions; (2) that the petitioner could have brought his claim more than a decade ago; (3) that there was no good reason for his abusive delay; and (4) that the petitioner's abusive delay had been compounded by last-minute attempts to manipulate the judicial process.

The Respondents in their Brief in Opposition attempt to analogize the Petitioner's case to the above-described underlying facts in Gomez. (RB:21-22). It is respectfully submitted that none of the above-described underlying facts in Gomez are present in the Petitioner's case. Most notably, the State of Alabama did not have lethal injection as the method of execution at the time the Petitioner filed his federal habeas corpus petition in 1997. Moreover, as set forth in detail in Section I, supra., the Petitioner raised his claim at the earliest practical time. Furthermore, the Petitioner is not challenging the method of execution in his action but rather is challenging a separate medical procedure that the Respondents intend to perform on him prior to the legal procedure of execution by lethal injection.

It should also be noted that some courts of appeal are interpreting this Court's ruling in Gomez as a per se rule precluding any death row inmate from pursuing a §1983 action, regardless of the type of relief the inmate is seeking. See e.g., Felker v. Turpin, 101 F.3d 95 (11th Cir.1996); In re Sapp, 118 F.3d 460 (6th Cir.1997).

arise within the context of a motion for new trial filed pursuant to Rule 33 of the Federal Rules of Criminal Procedure that is recharacterized by a court as a habeas corpus petition; a motion for relief from judgment filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure that is recharacterized by a court as a habeas corpus petition; or an action filed pursuant to 42 U.S.C. §1983 that is recharacterized by a court as a habeas corpus petition.

This Court has granted certiorari and is presently considering the propriety of a court recharacterizing a Rule 33 motion as a habeas corpus petition in Castro v. United States, Docket No. 02-6683. This Court previously granted certiorari to consider the propriety of a court recharacterizing a Rule 60(b) motion as a habeas corpus petition in Abdur'Rahman v. Bell, 535 U.S. 1016 (2002). Subsequent to the grant of certiorari, this Court determined that certiorari was improvidently granted and dismissed the petition for writ of certiorari. Abdur'Rahman v. Bell, 123 S.Ct. 1780 (2003).[5]

[5] If this Court determines that the Petitioner's action cannot proceed as a §1983 action, it is respectfully submitted that the Petitioner's case should be allowed to proceed as a habeas corpus application that is not successive under the authority of Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). In that case, the death row inmate claimed that he was incompetent to be executed. This Court found that even though the incompetency claim was raised in a second habeas corpus petition, that petition was not successive because the inmate "brought his

Consistent with this Court's interest in this issue within the context of Rule 33 and Rule 60(b), this Court should address this issue within the context of 42 U.S.C. §1983. This is true not only because it represents an important question of federal law but also because there is a split among the circuits that needs to be resolved.

Contrary to the Respondents' contention in their Brief in Opposition, there is a split among the circuits concerning this important federal question. The Respondents have conveniently failed to address the cases cited by the Petitioner in the Petitioner's Petition for Writ of Certiorari which demonstrates the split among the circuits. The courts of appeal that are in conflict with the decision rendered by the Eleventh Circuit in the Petitioner's case are the Eighth Circuit, the Ninth Circuit, and the Tenth Circuit.[6]

Specifically, in Young v. Hayes, 218 F.3d 850 (8th

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claim in a timely fashion" and the issue was only ripe when the inmate was scheduled to be executed. Id. at 645.

Similarly, in the Petitioner's case, the Petitioner brought his claim in a timely fashion. See Section I, supra. Additionally, the Petitioner's claim was only ripe when the Petitioner was scheduled to be executed. Consequently, it is respectfully submitted that, if construed as a habeas corpus petition, the Petitioner's petition is not successive under 28 U.S.C. §2244(b) and the authority of Stewart v. Martinez-Villareal.

[6] In the Petitioner's Petition for Writ of Certiorari, the Petitioner mistakenly relied upon Dotson v. Wilkinson, 300 F.3d 661 (6th Cir.2002) in asserting that there was a split between the Sixth Circuit and the Eleventh Circuit.

Cir.2000), the Eighth Circuit considered the merits of a §1983 action filed by a death row inmate who was scheduled to be executed the next day.[7]

In Wilson v. United States District Court for the Northern District of California, 161 F.3d 1185 (9th Cir.1998), the Ninth Circuit denied a motion to vacate a temporary restraining order that had been granted by the district court in order to hear the merits of a death row inmate's §1983 action regarding clemency proceedings. In so ruling, the court stated, "The court is mindful of the last minute nature of this proceeding. Nevertheless, the delay is not attributable to [the death row inmate]. This is not a case like Gomez v. United States District Court, 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) where the inmate could have brought his claim 'more than a decade ago.'" Wilson v. United States District Court for the

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[7] In their Brief in Opposition, the Respondents relied upon Williams v. Hopkins, 130 F.3d 333 (8th Cir.1997) for the proposition that there is no split between the Eighth Circuit and the Eleventh Circuit. (RB:17-18). First, it should be noted that the court in Williams v. Hopkins stated, "Claims challenging the conditions of confinement or the method by which a sentence is being carried out may be asserted through a §1983 cause of action" and this statement is in conflict with the precedent of the Eleventh Circuit. Id. at 335. Second, it should be noted that Young v. Hayes, 218 F.3d 850 (8th Cir.2000) was decided subsequent to Williams v. Hopkins and the Eighth Circuit in Young v. Hayes considered the §1983 action on its merits.

Northern District of California, 161 F.3d at 1187.[8]

In Duvall v. Keating, 162 F.3d 1058 (10th Cir.1998), the Tenth Circuit addressed a death row inmate's §1983 action regarding clemency proceedings on the merits.

The viability of a §1983 action brought by a death row inmate who has completed his federal habeas corpus proceedings and is not challenging his conviction or sentence is an important federal question that has caused a split among the federal courts of appeal. This Court should grant certiorari in order to address this important federal question and resolve the split among the circuits.

IV. CONCLUSION

For the reasons stated herein as well as for those reasons set forth in the Petitioner's Petition for Writ of Certiorari, it is respectfully requested that this Court grant the Petitioner's Petition for Writ of Certiorari.

[8]It should be noted that the district court in the Petitioner's case similarly found that "Nelson did not know about the State's plan to use a "cut-down" procedure until earlier this year, so he could not have raised this issue in the federal habeas action he filed in 1997." (D13:11).

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October 20, 2003

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Docket No. 03-6821

Dear Mr. Cahill:

Enclosed please find the original and ten copies of the Petitioner's Reply Brief in the above-referenced case.

If you have any questions about this correspondence or the enclosed pleadings, please contact me. Thank you for your assistance in this matter.

Sincerely,

Michael Kennedy McIntyre

Cc: Mr. Michael Billingsley,
Deputy Solicitor General
(With Enclosure)

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No. 03-6821
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

DAVID LARRY NELSON,
Petitioner,

v.

DONAL CAMPBELL and
GRANTT CULLIVER,
Respondents.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The State of Alabama submits this supplemental brief under Rule 15.8 of the rules of this Court in support of its opposition to Nelson's petition for a writ of certiorari. Nelson's petition was filed in this Court on the day of his scheduled execution, October 9, 2003. The State received a copy of Nelson's petition, along with two motions for stay and a petition for an original writ of habeas corpus, at approximately 1:45 p.m. In addition, that same afternoon, Nelson filed, in the Supreme Court of Alabama, a motion seeking a stay on the basis that his execution would violate the Constitution of Alabama. The State was, therefore, required to respond to Nelson's "eleventh hour" maneuvering in both this Court and the Supreme Court of Alabama. A response was submitted in the Supreme Court of Alabama between 2:00 and 3:00 p.m. A response to each of Nelson's pleadings filed in this Court, including a brief in opposition to Nelson's petition for a writ of certiorari, was faxed shortly after 3:00 p.m. Because of the timing of Nelson's petition – and the knowledge that this Court was awaiting a response – the State was required to hastily respond to Nelson's petition for a writ of certiorari. The State respectfully submits this supplemental brief in an effort to provide the Court with a more thorough response.

I. There is No Split in the Circuits Regarding Whether a Claim Such as Nelson's Can be Brought Under Section 1983.

Nelson asserts that "this Court should resolve the split among the circuits and address the important question ... concerning the viability of a § 1983 action brought by a death row inmate who has completed his federal habeas corpus proceedings and is not challenging his conviction or sentence." (Nelson's reply brief at p. 9) Nelson has failed to present an issue worthy of certiorari review. First, an examination of the cases Nelson relies on to support his assertion of a split reveals that no such split exists. Second, Nelson's contention that he is not challenging his sentence is incorrect. Because Nelson is challenging the procedures which may be necessary to carry out his sentence of death by lethal injection, he is, in fact, challenging his sentence.

A. There is no split of authority on the issue whether a claim such as Nelson's can be brought under section 1983.

Nelson asserts that the decision of the Court of Appeals is in conflict with the Eighth Circuit, the Ninth Circuit, and the Tenth Circuit. (Nelson's reply brief at p. 12)[1] More specifically, he relies on *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000), *Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9th Cir. 1988), and *Duvall v. Keating*, 162 F.3d 1058

[1] In his petition for a writ of certiorari, Nelson asserted that there was also a split between the Eleventh Circuit and the Sixth Circuit. In his reply brief, however, he states that his reliance on the Sixth Circuit to support his contention of a split was a "mistake."

(10th Cir. 1998). None of these decisions, however, conflict with the opinion of the Eleventh Circuit Court of Appeals in this case.

In *Young*, the death row inmate filed an action under section 1983 asserting that "the defendant Hayes, Circuit Attorney for the City of St. Louis, ha[d] threatened to fire one of the lawyers under her supervision, ... if [that lawyer] provide[d] information to the Governor ... in connection with a clemency petition Mr. Young wishe[d] to file." 218 F.3d at 851. The complaint was not, therefore, an Eighth Amendment challenge to the execution or any of the execution procedures, but rather asserted a due process violation based on "[i]nterference by an official of the State with the clemency process." *Id.* The district court did not address the jurisdictional issue and "dismissed the complaint for failure to state a claim, holding that there is no right whatever to due process of law in connection with a clemency proceeding." *Id.* at 852. On appeal, the Court of Appeals for the Eighth Circuit reversed on the merits, but, like the district court, did not address the jurisdictional issue. Whether the complaint should have been treated as an habeas was not considered by the Court of Appeals. "Because jurisdiction was not addressed, the [*Young*] decision is not binding precedent on the jurisdictional question presented in this case." *Gilreath v. State Board of Pardons and Paroles*, 273 F.3d 932, 934 n. * (11th Cir. 2001), *citing FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). *Young* does not, therefore, conflict with the decision below.

Indeed, when the Eighth Circuit has considered a claim like Nelson's, it has resolved it in a manner consistent with the opinion at issue here. In *Williams v. Hopkins*, 130 F.3d 333, 334 (8th Cir. 1997), the court considered a complaint, brought under § 1983, "challenging the constitutionality of death by electrocution in general and, more specifically, the constitutionality of the particular method by which Nebraska allegedly administers the electrical current for electrocutions." Regarding the latter claim, Williams could have, like Nelson, couched his claim as not a challenge to electrocution in general, but rather a challenge to the particular method by which Nebraska administers the electrical current. The 1983 complaint was rejected, however, on the basis that "the district court correctly determined that Williams' current complaint is the functional equivalent of a successive habeas action, regardless of its technical label." *Id.* at 336. "[A] 'challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus.'" *Id.* at 336, *quoting In re Sapp*, 118 F.3d 460, 462 (6th Cir.), *cert. denied*, 521 U.S. 1130 (1997). There is, therefore, no conflict between the Eleventh Circuit and the Eighth Circuit on the question presented.

Similarly, Nelson's reliance on *Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9th Cir. 1988), to support the existence of a split is flawed. *Wilson*, like *Young*, involved a due process

challenge to California's clemency proceedings, not a challenge to the execution procedures. *Wilson*, 161 F.3d at 1186. Moreover, the Ninth Circuit Court of Appeals did not even address the issue which Nelson claims has split the circuits. Rather, in *Wilson*, the district court granted a Temporary Restraining Order staying Jaturun Siripongs' execution based on his claim that "the clemency proceeding he received violated federal principles of due process ...." *Id.* In response, the State filed a petition for writ of mandamus seeking to overrule the Temporary Restraining Order. *Id.* The Court of Appeals denied the petition for mandamus not because, as Nelson insinuates, the action was properly filed under section 1983, but rather because the Court determined that the State did not demonstrate an entitlement to mandamus relief. *Id.* at 1187-88. The case cannot, therefore, be considered to be in conflict with the opinion below.[2]

Finally, not unlike the first two cases, the third case relied on by Nelson, *Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998), does not address the jurisdictional issue. In *Duvall*, a death row prisoner appealed "the order of the district court denying his request for a temporary restraining order ('TRO') and preliminary injunction and granting judgment in favor of defendants on his claim

[2] In his petition for a writ of certiorari, Nelson originally relied on *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996) to support his claim that the Ninth Circuit conflicted with the Eleventh circuit. As was pointed out by the State in its brief in opposition, however, the judgment in *Gomez* was subsequently vacated by this Court. 519 U.S. 918 (1996).

brought pursuant to 42 U.S.C. § 1983." 162 F.3d at 1059. The specific claim, moreover, did not relate to any execution procedures, but again asserted a due process violation resulting from the Governor's comments "that he [would] not grant clemency for murders." *Id.* at 1060. The Court of Appeals "determined that Mr. Duvall's right to due process ha[d] not been violated" and, therefore, denied his claim on the merits without considering whether his section 1983 complaint should have been construed as a habeas petition. *Id.* at 1062. Again, "[b]ecause jurisdiction was not addressed, the [*Duvall*] decision is not binding precedent on the jurisdictional question presented in this case." *Gilreath v. State Board of Pardons and Paroles*, 273 F.3d 932, 934 n. * (11th Cir. 2001), *citing FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994).

Nelson has failed to support his claim that there is a split among the federal circuits on the jurisdictional issue presented in his case. Indeed, the only cases he relies on do not even address the issue. As pointed out in the brief in opposition, those circuits that have considered the issue in relation to a claim like Nelson's have resolved it in a manner consistent with the Eleventh Circuit. (Brief in Opposition at pp. 16-19)

B. Because Nelson's complaint challenges procedures which may be necessary to carry out his sentence, his claim is a challenge to the sentence itself.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that an inmate cannot bring a § 1983 action that would "necessarily imply the invalidity of his conviction or sentence" unless he proves that his "conviction or sentence has already been invalidated." *Id.* at 486-87. Here, "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." *Nelson v. Campbell*, 2003 WL 22309895 at * 2, n. 4 (11th Cir. Oct. 8, 2003). His complaint was, therefore, properly construed as the "functional equivalent" of a successive habeas petition.

To avoid this result, Nelson has, throughout these proceedings, continuously stated that he does not challenge the validity of his sentence, but merely the possibility that the State will utilize a "cut-down" procedure to gain venous access for the purpose of carrying out the sentence.[3] This is a distinction without a difference. To carry out Nelson's execution by lethal injection, it is necessary to

[3] Contrary to the repeated representations of Nelson during this "last minute" litigation, the use of the procedure at issue is merely a possibility and will only be utilized as a last resort. Despite being aware of this fact, Nelson prominently placed on the front of his pleadings in the Alabama Supreme Court and the Eleventh Circuit Court of Appeals, the following statement: "Cut-down procedure expected to begin at approximately 4:00 p.m. central time." This representation was false.

gain venous access. A challenge to the procedures necessary to gain venous access is, therefore, a challenge to the method of execution itself.

Nelson's claim is no different than if he were challenging the use of a particular chemical during the lethal injection process. In such a case, he could characterize his claim, just as he as done here, as not a challenge to his execution per se, or even to lethal injection per se, but to the use of a particular chemical in the execution procedure. There can also be little doubt that Nelson could obtain an expert who would testify that a different chemical, a different amount, or a different method of administering the chemical would be more humane, effective, etc. The challenge would still be a challenge to the method of execution. Allowing Nelson to avoid the congressionally mandated restrictions of 28 U.S.C. section 2244 would open the section 1983 door to any claim professing to challenge not the method of execution itself, but rather a particular procedure utilized during the execution process. Again, this is a distinction without a practical difference.

Consistent with a number of other states utilizing lethal injection, the cut-down procedure will only be utilized in Nelson's case if the medical personnel responsible for connecting the direct intravenous line are unable to otherwise locate a suitable peripheral vein. At least three other States include the possibility of a cut-down procedure within their protocol for administering lethal injection.

Georgia's protocol specifically states that "[i]f the [condemned's] veins are such that an IV cannot be started, a contract physician will perform the cut down procedure to establish and intravenous port." Deborah W. Denno, When Legislature Delegate Death: The Troubling Paradox Behind State Uses Of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio State L. J. 63, 218 (2002). The protocol for the State of New Jersey provides that "[i]n the event that a useful vein cannot be located in any of the above site locations, the Medical Director shall execute a cut-down procedure to insert the intravenous line." Id. at 231. Similarly in Tennessee, "[t]he physician will be available in the designated waiting area and will perform a cutdown procedure if the IV technicians are unable to find a vein that is adequate enough to insert a catheter." Id. at 254. Additionally, in a report on methods of execution and protocols, the Florida Senate Committee on Criminal Justice noted that it had received information from a number of other States regarding lethal injection procedures. Florida Senate Committee on Criminal Justice, A Monitor: Methods of Execution & Protocols (1997), n. 24 available at http://www.fcc.state.fl.us/fcc/reports/monitor/methmon.html. "All of the states [Arizona, Idaho, Illinois, Missouri, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, and Virginia] report[ed] that a 'cut down'

procedure (a surgical procedure) is available if there is difficulty in locating a vein." Id.

Contrary to the representations of Dr. Heath, a "cut-down" is a medically recognized procedure that is commonly "used when percutaneous catheter insertion is not feasible ...." The Merck Manual of Diagnosis and Therapy 1621 (Mark H. Beers, M.D. & Robert Berkow, M.D. eds., 17th ed. 1999). The procedure "requires a small skin incision, after which a venotomy is made and a wide-bore plastic catheter is inserted into the vein and secured with sutures." Id. Although there are some "[c]ommon complications (e.g., local infection, venous thrombosis, thromhophlebitis, interstitial fluid extravasation)[, they] can be reduced by catheter removal as soon as possible or frequent catheter replacement." Id. Obviously, complications that can be reduced by catheter removal or replacement will not arise under the circumstances at issue here.

Dr. Heath, who has served as an expert for the condemned in at least two other death penalty cases,[4] describes the procedure in a much more dramatic

[4] Dr. Heath submitted an affidavit on behalf of Wallace M. Fugate, III in the case the Eleventh Circuit Court of Appeals found "indistinguishable" from this one. See *Nelson v. Campbell*, 2003 WL 22309895, at * 1 (11th Cir. 2003) ("We believe that the instant case is indistinguishable from *Fugate*; both sought to minimize the risk of unnecessary pain during the execution process, and both sought to stay the execution until appropriate corrective measures were taken."). He also testified on behalf of a death row inmate in Tennessee who was facing execution by lethal injection. See New York Times, Lethal Injection Drug May Be Deceptive, October 7, 2003. (referring to Dr. Mark Heath's testimony supporting death row inmate's claim that lethal injection, Tennessee's method of execution, violates the Eighth Amendment).

fashion plainly slanted to suit the purpose of his testimony. For example, he states that "[w]hen performed electively, ... cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain), because it would otherwise be an extraordinarily disturbing and distressing experience." (Affidavit of Dr. Heath at paragraph 13) This statement is, however, nonsensical. If the procedure is necessary to locate a vein for connecting an intravenous line, how is one able to "adminst[er] potent intravenous analgesics?" It simply is not uncommon for the procedure to be conducted using a local anesthetic. See Principles and Practice of Emergency Medicine, Volume One 687 (George R. Schwartz, M.D. ed. 3rd ed. 1992) ("The region of the incision is infiltrated with local anesthetic (this may be omitted in the unconscious patient or the neonate.").

The fact that at least fourteen other States consider a cut-down to be a viable method for obtaining venous access demonstrates that the procedure is part of the lethal injection process. Nelson's attempt to have the mere possibility of such a process declared unconstitutional is a challenge to Alabama's manner of execution and, thus, a challenge to the sentence itself. *See In re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997) (holding that a "challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus"), *cert. denied*, 521 U.S. 1130 (1997). A contrary

holding would invite section 1983 actions in all of the States utilizing lethal injections challenging cut-down procedures or other methods for obtaining venous access, without which the sentence cannot be carried out.

II. Nelson's Decision to File at the Eleventh Hour is not "Properly Attributable" to the Respondents.

As pointed out in the brief in opposition, Nelson was fully aware of the factual basis for his claim – including the possibility that, if necessary, a "cut-down" procedure would be utilized – nearly two months before his scheduled execution date. Yet, despite this fact, Nelson waited until the afternoon of the Monday before his scheduled Thursday execution to file his complaint. In his reply brief, he attempts to blame the State for his decision to wait until the "eleventh hour" to pursue his claim. Specifically, he asserts that "[t]he delay is properly attributable to the Respondents because the Respondents misled the Petitioner concerning the time at which the medical procedure would be performed and only informed the Petitioner of the true time that the medical procedure would be performed six days prior to the date of the Petitioner's scheduled execution." (Nelson's reply brief at p. 1) Nelson's excuse is fallacious and unsupported by the facts.

Nelson has never sought relief on the basis of the timing of the procedure in question. Rather, he has always based his claim of an Eighth Amendment violation on the procedure itself. (See Nelson's Petition for a Writ of Certiorari at

p. 4) ("Nelson brought this action pursuant to 42 U.S.C. § 1983 to challenge the cut-down procedure which the Respondents intend to utilize in order to gain venous access prior to Nelson's execution.") It is undisputed that nearly two months before his scheduled execution date, Nelson was aware of the possibility that a "cut-down" procedure would be required, and whether such a procedure constitutes cruel and unusual punishment clearly does not turn on when it is utilized.

Nelson's after-the-fact excuse is further contradicted by his contention that he has "consistently since mid-August 2003 attempted to have [Nelson] examined by a physician,[5] to acquire the State of Alabama's written protocol for the legal procedure of execution by lethal injection and/or for the medical procedure that will be necessary to be performed as a predicate to the execution, and to ensure that a credentialed physician with adequate training and experience would perform the medical procedure on [Nelson] with access to proper medical equipment." (Nelson's petition at pp. 6-7, n. 2) He further asserts that the "Respondent has continuously ... frustrated [his] efforts in these endeavors." (Id.) These statements cannot be reconciled with Nelson's after-the-fact position that he waited until the "eleventh hour" to file his claim because he "believed that the Respondents were

[5] Warden Culliver refuted this claim in his affidavit, stating that "[n]either Nelson nor his lawyers have ever requested that a physician be admitted into Holman to perform an examination of Nelson." (Culliver affidavit at ¶ 5)

acting in good faith" until the Friday before his scheduled execution. Either the Respondents were "continuously frustrating his efforts" or they were "acting in good faith." Both statements cannot be accurate. Plainly, Nelson waited to file his complaint until the "eleventh hour" in an effort to prevent the State from carrying out his sentence. Indeed, the tactic succeeded. This Court granted a stay because it needed *more time* to consider Nelson's petition for a writ of certiorari.[6]

Finally, it is undisputed that a concern about the status of Nelson's peripheral veins came to the attention of the State because Nelson raised the concern. Nelson was fully aware that, because of his prior intravenous drug use, locating a peripheral vein in his lower arms might be problematic. He even references previous occasions when, he claims, medical personal had a difficult time locating a vein for the purpose of drawing blood. (See Nelson's petition at p. 5) He was, therefore, aware of the basis for his claim on July 1, 2002 when the State of Alabama changed its primary method of execution from electrocution to lethal injection. Ala. Code § 15-18-82.1. Indeed, within 30 days of that date,

[6] Nelson's decision to wait until the week of his execution to file his claim also benefited him by requiring the State to hastily prepare a response. For example, he has repeatedly pointed out that the affidavits submitted by the State mislabel the vein in Nelson's neck that may be utilized depending on whether other primary options are successful. Admittedly, the vein was mislabeled and that was a mistake. As Dr. Heath subsequently correctly speculated, the affidavits should have referred to "the 'external jugular vein.'" (Second affidavit of Dr. Mark Heath at ¶ 8) Dr. Heath characterizes the external jugular vein as a "commonly-used structure for obtaining intravenous access if peripheral access can not be secured" and provides no basis for a belief that, should it become necessary, the jugular vein cannot be successfully utilized for such a purpose in this case.

under section § 15-18-82.1(b), Nelson could have elected to have his sentence carried out by electrocution. Instead, Nelson waited until the week of his execution to file his complaint, successfully preventing the State of Alabama from carrying out his lawfully imposed sentence.

CONCLUSION

Based upon the preceding legal authority and argument, this Court should deny Nelson's petition for a writ of certiorari.

Respectfully submitted,

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CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

October Term, 2003

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL
and
GRANTT CULLIVER,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF REPLYING TO RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS TO THE RECORD

Citations to the record will be as follows:

Transcript of In-chambers Telephone Conference conducted by the United States District Court for the Middle District of Alabama on October 7, 2003 (T:appropriate page number);

Petitioner's Petition for Writ of Certiorari (PP: appropriate page number);

Petitioners Reply Brief to Respondent's Brief in Opposition (PRB:appropriate page number); and

Respondent's Supplemental Brief in Opposition (RSB:appropriate page number).

ARGUMENT AND AUTHORITY

I. INTRODUCTION

Presently pending before this Court is the Petitioner's Petition for Writ of Certiorari, which was filed on October 9, 2003. The Respondents filed a Brief in Opposition to said Petition for Writ of Certiorari on October 9, 2003. On October 20, 2003, the Petitioner filed his Reply Brief to the Respondents' Brief in Opposition. On November 10, 2003, the Petitioner was served with the Respondents' "Supplemental Brief in Opposition to Petition for Writ of Certiorari" (hereinafter referred to as the Respondents' "Supplemental Brief"). The purpose of this pleading is to respond briefly to several points raised in the Respondents' Supplemental Brief.[1]

II. THE RESPONDENTS' ASSERTION THAT UTILIZATION OF A CUT-DOWN PROCEDURE IS "MERELY A POSSIBILITY" IS DISINGENUOUS

The Respondents assert on page 7 of their Supplemental Brief that "the use of the [cut-down] procedure at issue is merely a possibility and will only be utilized as a last

[1] The Respondents' latest brief purports to be a supplemental brief filed pursuant Rule 15.8. of the Rules of this Court. The Respondents' latest brief, however fails to comply with Rule 15.8. in that said brief fails to refer to "new cases, new legislation, or other intervening matter not available at the time of the party's last filing." Since the Respondents' latest brief fails to comply with Rule 15.8., it is respectfully submitted that this Court should strike the Respondents' "Supplemental Brief" from the record if the Court deems such action appropriate.

resort." (RSB:7,fn. 3). This truly is a disingenuous statement by the Respondents given Respondent Culliver's discussions with the Petitioner, during which he initially proposed inserting the requisite catheter into the Petitioner via a cut-down procedure that would be performed at least twenty-four hours in advance of the Petitioner's execution. (T:9,12,23)(PP:16). If a cut-down procedure is "merely a possibility" as the Respondents assert, why was it the sole step in the plan Respondent Culliver' initially described to the Petitioner? Further, if a cut-down procedure is "merely a possibility", why did Respondent Culliver retain the cut-down procedure as the sole step in his plan after amending his plan during a second discussion with the Petitioner to have the cut-down procedure performed one to two hours before the Petitioner's execution? (T:9,24)(PP:16).[2] Obviously, the

[2] As is set forth in the Petitioner's Petition for Writ of Certiorari, Respondent Warden Culliver and a nurse met with the Petitioner together on two separate occasions to describe the medical procedure that Warden Culliver intends to implement with the Petitioner to gain venous access. Warden Culliver and the nurse initially described the medical procedure as (1) involving an incision of approximately 0.5 inch being made in the Petitioner's arm through which a catheter would be inserted into a vein and (2) being performed at least twenty-four hours in advance of the execution. Later, Warden Culliver and the nurse informed the Petitioner that (1) the incision will be approximately two inches in length and will be made either in the Petitioner's leg or arm, (2) this medical procedure will not be performed until approximately one hour before the execution, and (3) only a local anesthetic will be used during the procedure.

Respondents do not believe that the use of a cut-down procedure is "merely a possibility".

III. THE RESPONDENTS' ANALOGY OF THE PETITIONER'S MEDICAL PROCEDURE CHALLENGE TO A CHEMICAL COMPOSITION CHALLENGE IS COMPLETELY MISPLACED

In equating the Petitioner's challenge to the medical procedure to be performed upon him by the Respondents prior to his execution as a challenge to the Petitioner's sentence of death itself, the Respondents on page 8 of their Supplemental Brief assert, "Nelson's claim is no different than if he were challenging the use of a particular chemical during the lethal injection process." The Respondents' analogy is completely misplaced. Obviously, a challenge to the chemicals used for lethal injection constitutes a challenge to a sentence of death by lethal injection.

In sharp contrast, in the Petitioner's case, the Respondents will have to perform complicated, delicate surgery on the Petitioner in order to be in a position to carry out the sentence of death by lethal injection. The Petitioner's challenge is to this medical procedure and not to the sentence of death.[3] The Petitioner's argument simply is that the

[3] Consistent with this assertion, in Paragraph 2 of Respondent Warden Culliver's Affidavit, counsel for the Petitioner approached Warden Culliver with a request for death by electrocution because of the Petitioner's concerns regarding his veins only to be informed by Warden Culliver that electrocution was not an option for the Petitioner.

Respondents can place themselves in the very position in which they want to be by having a credentialed physician perform the surgery on the Petitioner, utilizing methods that comport with contemporary standards of medical care. As the Petitioner has repeatedly stated, he is not challenging his sentence of death but rather the medical procedures the Respondents have proposed performing in order for them to be in a position to proceed with the Petitioner's sentence of death. Had the Respondents months ago simply retained a credentialed physician to perform the requisite medical procedure, this litigation would not have been necessary.

IV. THE RESPONDENTS' REFERENCES TO OTHER STATES' LETHAL INJECTION PROTOCOLS ARE HIGHLY OFFENSIVE GIVEN THE RESPONDENTS' REFUSAL TO RELEASE THEIR PROTOCOL

That the Respondents have the gall to refer to other states' lethal injection protocols is extremely offensive given their refusal to release any information regarding their own protocol to any court, to the Petitioner, or to the public. The Respondents on page 9 of their Supplemental Brief rely on a law review article authored by Deborah Denno in support of their argument that, since a cut-down procedure is included in several other states' lethal injection protocols, the Respondents' use of a cut-down procedure is not aberrant. In so doing, the Respondents, of course, fail to address the qualifications of the people responsible for performing the cut-down procedures in

these other states. The Respondents also notably fail to quote many relevant parts of Ms. Denno's article, which is an article criticizing the lethal injection protocols of all the states. Some of those quotes which are relevant to the Petitioner's case are as follows:

> Legislatures delegate death to prison personnel and executioners who are not qualified to devise a lethal injection protocol, much less carry one out.

63 Ohio State Law Journal 63, 66 (2002).

> ...prison officials are wrongly delegated a degree of discretion for which they have no training and knowledge.

63 Ohio State Law Journal 63, 69 (2002).

> ...medically trained people have enough difficulty finding a vein with certain individuals; for untrained executioners, the problems are compounded substantially.

63 Ohio State Law Journal 63, 110 (2002).

> Ironically, the mere fact that the protocols in eight states warn executioners of problems, suggests that prison officials are aware of the hazards involved if ill-trained individuals administer a lethal injection. An experienced anesthetist would not need such warnings...

63 Ohio State Law Journal 63, 121 (2002).

> Finally, lethal injection is considered the most humane method for the euthanasia of animals. However, the Humane Society firmly states that the chemicals must be injected by "well trained and caring personnel" - - a sharp contrast to the qualifications available for those executing death row inmates.

63 Ohio State Law Journal 63, 110 (2002).

The Respondents on page 9 of their Supplemental Brief also refer to a "report on methods of execution and protocols" published by the Florida Senate Committee regarding other states' protocols that include cut-down procedures. The Respondents, however, do not describe any details from the report concerning the other states' protocols regarding the cut-down procedure. For example, the Respondents fail to note that the report states that Oklahoma requires a licensed phlebotomist be present to insert the intravenous lines in the condemned inmate and that a physician be present as a witness to the execution. (See http:www.fcc.state.fl.us/fcc/reports/monitor/methmon.html).[4]

V. THERE CLEARLY IS A SPLIT AMONG THE CIRCUITS CONCERNING THE OPERATION OF 28 U.S.C. §2244(b) AND ACTIONS FILED PURSUANT TO 42 U.S.C. §1983

On pages 2 through 6 of their Supplemental Brief, the Respondents contend that there is no split among the circuits concerning the operation of 28 U.S.C. §2244(b) and actions filed pursuant to 42 U.S.C. §1983. This is not true. As is set forth in the Petitioner's Reply Brief, there is a split among the

[4] It should be noted that the Respondents on page 11 of their Supplemental Brief assert that "at least fourteen other States consider a cut-down to be a viable method for obtaining venous access" but fail to offer a cite for this assertion. On page 9 of their Supplemental Brief, they name eleven states that they claim include cut-down procedures in lethal injection protocols, citing the aforementioned Florida Senate Committee report.

circuits. (PRB:12-14). The Eighth, Ninth, and Tenth Circuits are in conflict with the decision rendered in the Petitioner's case by the Eleventh Circuit.

The bottom line is that in the Eleventh Circuit, any action filed pursuant to 42 U.S.C. §1983 will be recharacterized as a habeas corpus petition and dismissed for lack of jurisdiction if the petitioner has previously filed a federal habeas corpus petition. However, in the Eighth, Ninth, and Tenth Circuits, such a §1983 action may be reviewed on the merits.

VI. CONCLUSION

For the reasons set forth herein as well as those set forth in the Petitioner's Petition for Writ of Certiorari and his Reply Brief, it is respectfully requested that this Court grant the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of the Petitioner's Supplemental Brief Replying to Respondents' Supplemental Brief in Opposition to Petition for Writ of Certiorari by placing a copy same in the United States Mail with proper postage affixed thereto and addressed as follows:

Mr. Michael B. Billingsley
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130

Dated: This 12th day of November, 2003.

Michael Kennedy McIntyre

(9)

No.03-6821

IN THE UNITED STATES SUPREME COURT

October Term, 2003

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL,
Commissioner of the Alabama Department of Corrections,
and
GRANTT CULLIVER,
Warden of William C. Holman Correctional Facility,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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TO THE UNITED STATES COURT OF APPEALS
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MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF PRIOR TO THE COURT'S CONSIDERATIN OF A PETITION FOR WRIT OF CERTIORARI

The amici curiae listed below, pursuant to Rule 37.2(b), Rules of the Supreme Court of the United States, move this Court for leave to file a brief in support of the above-captioned petition for a writ of certiorari.

BEST AVAILABLE COPY

In support, the amici curiae submit:

1. The above-styled petition for a writ of certiorari was timely filed. Petitioner is indigent and has been permitted to proceed in forma pauperis in all prior proceedings.

2. The above-styled petition centers around medical procedures contemplated by the Respondents to be performed on the Petitioner to gain venous access to the Petitioner so that he may be executed by lethal injection. The medical procedures being contemplated by the Respondents are complicated medical procedures that will involve significant risk to the Petitioner and should be performed only by highly specialized, credentialed medical personnel.

3. From the limited information volunteered by the Respondents throughout litigation of this matter, it appears that no competent, credentialed physician is overseeing the Respondents' plan to gain venous access to the Petitioner. Furthermore, it is unknown what experience and credentials the medical personnel who will be employed by the Respondents to perform the medical procedures possess.

4. The amici curiae are all practicing physicians in the State of Alabama who have reviewed the Respondents' proposed plan to gain venous access in the Petitioner. The amici curiae, with their medical training and knowledge, can offer a unique perspective to the Petitioner's case and can explain to the Court the medical concerns raised by the Respondent's proposed medical procedures.

5. The amici curiae are in a position to raise matters that neither of the parties can raise given their responsibilities as advocates and their lack of medical training.

6. The amici curiae offer the attached brief in support of the Petitioner's Petition for Writ of Certiorari. The amici curiae received authorization from the Petitioner's counsel to file the attached brief. Counsel for the Respondent refused to consent to the filing of a brief by amici curiae.

ACCORDINGLY, the amici curiae move this Court for leave to file the attached brief in support of this Court's consideration of Petitioner David Nelson's Petition for Writ of Certiorari.

Respectfully Submitted,

Kathryn L Lippert

KATHRYN LOUISE LIPPERT
Counsel for Amici Curiae

No.03-6821

IN THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

The Petitioner has raised the following two questions in his Petition for Writ of Certiorari before this Court:

1. Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. § 1983, which does not attack a conviction or sentence, is – simply because the person is under a sentence of death – to be treated as a habeas corpus case subject to the restriction on successive petitions which categorically precludes review of *any* constitutional violation not related to innocence (as the Fourth, Fifth and Eleventh Circuits hold), or can be maintained as § 1983 action (as the Sixth, Eighth and Ninth Circuits and several lower courts hold)?

2. Whether a cut-down procedure, which involves pain and mutilation, conducted prior to an execution by lethal injection, violates the Eighth Amendment to the United States Constitution?

STATEMENT OF INTEREST OF AMICI CURIAE

Each amicus curiae is a practicing physician in the State of Alabama[1]. The amici curiae have been informed of the medical procedures the Respondents have proposed using to gain venous access to the Petitioner to execute him by lethal injection.

The proposed medical procedures concern us as physicians for a number of reasons. First, obtaining central venous access is a complex medical procedure that involves serious risks and should only be performed by properly trained personnel. In this situation the Respondents will not disclose the credentials of the people who will be performing the procedure, including whether or not the physician is actually licensed to practice medicine in the State of Alabama or any other state. We are also concerned because it is apparent to us that the Respondents hope to implement a plan that was not designed by competent, credentialed physicians, and thereby are placing the Petitioner at high risk of enduring severe and needless pain and suffering.

---

1 Pursuant to Rule 37.6, Rules of the Supreme Court of the United States, counsel for neither party has authored this brief in whole or in part.

SUMMARY OF ARGUMENT

The Respondents must gain venous access to the Petitioner in order to execute him by lethal injection. Venous access may be obtained in most people by placing a very thin catheter under the skin in the hand or arm. Gaining venous access in this manner is referred to as peripheral venous access and is a relatively simple procedure.

Gaining peripheral venous access may be difficult or essentially impossible in some patients. When dealing with these people, central venous access must be obtained, which involves obtaining access to a central vein such as those in the chest and abdomen. Central venous access can only be achieved via a relatively complicated medical procedure.

The Respondents have essentially conceded that they will not be able to gain peripheral venous access to the Petitioner in order to execute him by lethal injection. As such, they will have to perform an invasive medical procedure to gain central venous access to the Petitioner prior to his execution.

There are two predominant methods for obtaining central venous access - - the percutaneous technique and the cut down

technique. In the overwhelming majority of situations where central venous access is required, the percutaneous technique is heavily favored over the cut down technique. This is because the percutaneous technique is less invasive, less painful, safer, faster, easier to learn, easier to teach, and easier to perform.

Attempts to gain central venous access should only be made by skilled, experienced physicians who have been specially trained to perform the requisite medical procedures. It cannot be emphasized enough that merely being a physician in no way qualifies a person to perform medical procedures to gain central venous access.

Many serious and painful complications may arise while a central venous catheter is being placed. These complications include severe pain, hemorrhage (severe bleeding), serious cardiac arrhythmias (abnormal beating of the heart causing shock), and pneumothorax (lung collapse due to collection of air between the lung and chest wall). Additionally, the amount of pain caused by the procedure is related to the experience of the medical practitioner performing the procedure.

For some unknown reason, the Respondents intend to use the cut down procedure instead of the percutaneous procedure. The Respondents also refuse to disclose the credentials and experience of the medical personnel who will be in charge of performing the cut down procedure.

Based on the scant information that the Respondents have disclosed, it appears that people with sufficient medical knowledge have not designed the medical procedure being prepared by the Respondents. Furthermore, there are no assurances that a competent, qualified, licensed physician will be performing the medical procedures proposed by the Respondents.

Of no small concern is the fact that the proposed medical procedures described by the Respondents include references to anatomy not present in human beings. In addition, the Respondents use the terms "percutaneous technique" and "cut down technique" interchangeably when the techniques are completely distinct.

Based upon the foregoing, the amici curiae have grave concerns about the medical procedures proposed by the Respondents. The amici curiae strongly recommend that the Petitioner's execution

be postponed until the Respondents disclose a medically sound, detailed description of the procedure that will be undertaken as well as a description of the experience and credentials of the medical personnel who will be performing the procedure.

ARGUMENT

I. INTRODUCTION

The Respondents have encountered a unique problem in the Petitioner's case involving the need for medical procedures to be performed on the Petitioner in order for the Respondents to gain intravenous access to the Petitioner for the purpose of executing him by lethal injection. It the intent of the amici curiae to outline some of the considerations surrounding intravenous access and also to explain the bases for our concerns about the medical procedures for gaining intravenous access to the Petitioner which are being contemplated by the Respondents.

II. BASIC CONSIDERATIONS REGARDING INTRAVENOUS ACCESS

Obtaining intravenous access is a common and essential procedure in the contemporary practice of medicine, because many drugs are only effective if delivered directly into the venous system.

In the vast majority of situations, intravenous access can be easily obtained by placing a very thin catheter (the same diameter or smaller than the wire of a coat hanger) into a vein located just under the skin in the hand or arm. This is called "peripheral access", as contrasted with "central access" which makes use of a "central vein" such as those in the chest and abdomen. Peripheral access is usually a minor procedure that causes a small amount of pain or discomfort, comparable to that caused by a vaccination.

Unfortunately, in some patients peripheral access cannot easily be obtained, or is essentially impossible to obtain. One circumstance where this problem is commonly encountered is in patients who have received chemotherapy, which causes injury and scarring of peripheral subcutaneous veins. As their veins deteriorate, a point is reached where the search for peripheral access becomes arduous and agonizing, and the patient and physician reach a joint decision to place a central intravenous catheter. This decision is not reached lightly, as placement of a chronic indwelling central catheter is a non-trivial surgical procedure that involves pain and risk. Often the patient is referred to a physician with expertise in obtaining vascular access; as

many physicians do not themselves have the experience and credentials to place a central catheter or to treat the complications that are associated with the procedure. Other clinical situations that involve difficult intravenous access include obese patients (in whom the subcutaneous veins are obscured by adipose tissue), patients who have taken corticosteroids for diseases such as arthritis and lupus, patients who suffer from diabetes and regularly inject insulin, and patients with a history of intravenous drug abuse. Additionally, some patients without any apparent reason just have no readily accessible peripheral veins.

Central venous access is indicated in several other clinical situations. As an example, patients undergoing major surgery often undergo central line placement (usually after general anesthesia has been induced) for the purposes of delivering large volumes of blood and fluids to treat anticipated intraoperative bleeding. Patients undergoing cardiac catheterizaton for diagnostic purposes may also require the placement of central venous catheters. Central access is also required for the placement of implanted cardiac pacemakers. The above list is not intended to be comprehensive, but rather is presented

for the purpose of conveying the scope of settings in which central intravenous access may be required.

It should be noted that in the great majority of the above-referenced therapeutic situations, peripheral intravenous access is obtained prior to embarking on the central venous access procedure. This allows the practitioner to administer painkillers and sedatives which render the central venous access procedure virtually innocuous. In the rare and unfortunate situation where peripheral intravenous access cannot be established before placing the central line, the experience is physically grueling, painful, and arduous for the person undergoing the procedure.

III. TECHNIQUES FOR OBTAINING CENTRAL VENOUS ACCESS

Putting aside rarely used methods, it is fair to say that two main techniques are used for obtaining central venous access. One technique, which is the most commonly used today, is called the "percutaneous technique". This involves inserting a needle through the skin and into the vein, then passing a thin wire through the lumen of the needle, then removing the needle over the wire to leave the wire placed in the vein, and then finally advancing a thin flexible catheter

over the wire into the vein. The wire can then be removed, leaving the catheter in the vein. Usually this procedure is performed in the groin (femoral vein), the neck (internal or external jugular vein), or under the collar bone (subclavian vein).

The second technique for obtaining central intravenous access is called the cut down technique. This involves the use of a scalpel to make a series of incisions through the skin, the subcutaneous fat, and the underlying muscle, to reach the relatively deeply located central vein. The length of these incisions is in the range of two inches and depends upon a variety of factors including location of the incision, degree of scarring, depth of the vessel, and the skill of the surgeon. As with the percutaneous technique, this procedure is usually performed in the groin (femoral vein), the neck (internal or external jugular vein), or under the collar bone (subclavian vein). The cut down technique is also used to obtain access to veins in the arm and leg, particularly in the setting of shock from trauma, where bleeding has emptied the vascular system and percutaneous access is thereby made difficult. Unlike the percutaneous technique, the cut down technique requires an array of surgical tools including hemostats, retractors, scissors, and

scalpels. The procedure typically requires the use of electrocautery, which is used to stop bleeding by burning the open ends of blood vessels.

The selection between these techniques is a therapeutic decision that is made by the practitioner based on the considerations of the individual situation. Nevertheless, we state with confidence that in the overwhelming majority of situations where central access is required, the percutaneous technique is heavily favored over the cut down procedure. The reasons for this are simple: compared with the cut down technique, the percutaneous technique is less invasive, less painful, less expensive, safer, faster, easier to learn, easier to teach, and easier to perform.

IV. QUALIFICATIONS FOR OBTAINING CENTRAL ACCESS

Obtaining central venous access, whether by the percutaneous technique or the cut down technique, is a significant medical procedure that requires skill, judgment, and experience. These procedures are typically taught during post-graduate medical residency training, and involve "elbow to elbow" supervision by an experienced practitioner. Some medical specialties (including surgery,

anesthesiology, cardiology, intensive care, and interventional radiology) frequently involve placement of central venous catheters. In other medical specialties, it is frequently the case that a patient requiring central venous access will be referred to a physician with expertise and proficiency in performing the procedure.

For physicians to be permitted to practice in a given hospital, they must apply for and receive admitting privileges. As part of this process, a physician will apply for permission to perform various procedures, and hospitals have in place systems for ascertaining whether such procedure privileges should be granted. Obtaining central venous access, whether by the percutaneous technique or the cut down technique, is a procedure that is specifically privileged by hospitals. This system is followed throughout the country as a means of ensuring that personnel possessing adequate training and experience care for patients. In particular, in granting privileges for performing central venous access a hospital board would need evidence that a physician performs the procedure with significant frequency and has appropriate credentials. Among the required credentials would be evidence of active state licensure. A hospital would also need to

review a physician's career record to ensure that there was no history of licensure revocation for misconduct or incompetence. It is very important to understand that merely being a physician in no way provides an assurance that proficiency or even familiarity with intravenous access exists.

V. COMPLICATIONS OF PLACING CENTRAL VENOUS CATHETERS

One of the reasons for requiring credentialing for obtaining central venous access is that the procedures are associated with significant complications. These complications include pain, hemorrhage (severe bleeding), cardiac arrhythmias, and pneumothorax (accumulation of air in the space between the lung and inner chest wall, causing lung collapse and suffocation). The amount of pain caused by the procedure is related to the experience of the practitioner. A skilled practitioner will spend less time "fishing around" to find the location of the vein and will be more adept at effectively infiltrating local anesthesia to make the procedure more comfortable.

Hemorrhage can occur because of lacerating or rupturing the large blood vessels that are the targets of the procedure. Hemorrhage can be external or internal. If it is external, one result can be

widespread distribution of blood throughout the operative field, including the drapes covering the patient's face, the floor, the medical personnel, and the operating table. If the hemorrhage is internal, expertise and experience is often required to recognize the problem and provide appropriate treatment. Hemorrhage, while not painful per se, is extraordinarily distressing and is associated with nausea, shortness of breath, a sense of suffocation, and terror.

Cardiac arrhythmias (abnormal beating of the heart) can be triggered by inadvertent stimulation of the heart muscle by the catheter or wire. These arrhythmias can cause a profound lowering of blood pressure, which like hemorrhage is extremely distressing. If that were to occur, the patient would likely require electrical defribrillation or electrical cardioversion, both of which would burn the skin and produce an extraordinarily agonizing experience for a conscious patient.

Finally, the complication of pneumothorax can be caused by inadvertently puncturing the thin sac that separates the lungs from the inner side of the chest wall. The resulting lung collapse is painful and extremely distressing, causing suffocation and sometimes death. The

treatment of pneumothorax involves the insertion of one or more large diameter tubes (approximately one-half inch in diameter) between the ribs and deep into the chest to evacuate the air. This procedure is painful, should only be performed by experienced practitioners, and is accompanied by its own set of catastrophic complications.

It should be noted that in most clinical situations in which central venous access is being obtained, peripheral intravenous access has already been established. Peripheral lines play a critical role in the treatment of the above-described complications because they permit the administration of painkillers and sedatives, drugs for treating arrhythmias, and allow for the infusion of blood and other fluids to treat hemorrhage. Logically, in a setting where central access is required because peripheral access could not be achieved, these complications are much more fearsome and difficult to manage.

VI. CONCERNS OF AMICI CURIAE REGARDING THE STATE OF ALABAMA'S PROPOSED PROCEDURES TO OBTAIN CENTRAL VENOUS ACCESS IN THE PETITIONER

It is our understanding that the Petitioner has a history of difficult intravenous access. The affidavit of Warden Grantt Culliver states that difficulty is anticipated in obtaining intravenous access and

that a plan has been formulated to obtain central venous access. It is our further understanding that this plan involves attempting catheter placement in the groin, the neck, or the arm.

It is our understanding that the Respondents have refused to disclose the State of Alabama's protocol for lethal injection and have disclosed very little information about the methods that will be employed in attempts to gain venous access in the Petitioner. It is our further understanding that the Respondents have not disclosed any information about the personnel who will be placing the central catheter in the Petitioner, including information about the personnel's credentials and experience. Indeed, it is not even known whether the individual who will be performing the medical procedure holds a current license to practice medicine in the State of Alabama or any other state. Thus, there is no assurance or basis for confidence that a suitably proficient practitioner will perform the medical procedure.

The failure on the part of the Respondents to provide this information makes it impossible to rationally ascertain whether or not reasonable steps have been taken to ensure that the procedure will not be bungled and cause extreme suffering and distress to the Petitioner.

Warden Culliver in his affidavit states that if the central intravenous access is obtained via the neck, the "external carotid vein" will be used. There is no such structure in human beings, and it is not credible to the amici curiae that a trained physician or practitioner would even mistakenly use this term. Oddly, an affidavit by Dr. Marc Sonnier also uses the term "external carotid vein". The use of this term bespeaks the presence of less than a glimmer of familiarity with the procedure and buttresses our concern that the personnel recruited by the Respondents for this procedure will not possess the requisite proficiency and expertise. It is difficult to believe that any personnel currently employed by the Respondents possess the requisite expertise to perform, review, or "sign off" on the procedures proposed by the Respondents.

It is our understanding that Warden Culliver's initial plan was to place the central line twenty-four hours in advance of the execution. This plan reflects a troubling lack of judgment. The fact that Warden Culliver retracted this ill-advised plan, eventually asserting that the procedure would be performed one or two hours prior to the execution, does nothing to mitigate the fact that he made the proposal and, for a

period of time, defended it. Also, it is our understanding that Warden Culliver initially informed the Petitioner that the procedure would involve an incision a quarter of an inch in length but later informed the Petitioner, as is reflected in his affidavit, that the incision would be approximately two inches in length. Warden Culliver clearly lacks the experience and expertise to make decisions about the medical features of the procedure.

It is also our understanding that during early discussions about plans to obtain intravenous access in the Petitioner, Warden Culliver used the term "cut-down" to refer to the percutaneous procedure. As described above, the two procedures are very different, and in virtually all cases it is preferable to use the percutaneous technique. Warden Culliver's failure to discern the distinctions between these procedures, in conjunction with his apparent prominent role in designing the procedure, strongly suggests that the Petitioner is at risk for being subjected to a poorly designed procedure.

In summary, the procedures for obtaining central venous access are complex medical procedures that require training and skill and should only be performed by experienced and credentialed personnel.

Warden Culliver's approach thus far has been to conceal from the Petiitoner the nature of the procedure to be performed and the qualifications of the personnel who will be performing it. Based upon the scant information that has been provided by the Respondents, the amici curiae are concerned that the Petitioner is at great risk of experiencing unnecessary suffering and pain.

VII. CONCLUSION

In view of the above-described problems, each amicus curiae cannot escape the unfortunate conclusion that the Respondents have taken a haphazard and disarrayed approach to designing the procedure for obtaining intravenous access in the Petitioner's case. This situation brings to mind an adage of medical training, "failing to plan is planning to fail". We do not understand why it would not be in the best interest of the Respondents to contract with a demonstrably experienced physician to perform the procedure of obtaining central intravenous access on the Petitioner. We also do not understand why it would not be in the best interest of the Respondents to provide information about the physician's credentials so that it could be reasonably determined that central intravenous access would be

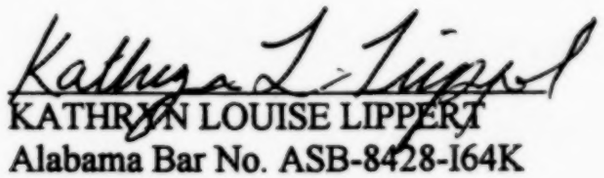
obtained in a fashion that would minimize the risk of needless cruelty, pain, and suffering.

It is our understanding the need to obtain central venous access in the Petitioner is not emergent. The readily apparent lack of a coherent program for designing and carrying out this procedure on the Petitioner leads us to recommend in the strongest possible terms that the procedure be postponed until the elements set forth above are brought into place. Specifically, we recommend that the Respondents be required to disclose a reasonably detailed and medically sound description of the procedure to be undertaken and a detailed description of the personnel who will be performing the procedure, including the credentials of the medical personnel. We, of course, recognize the medical personnel's desire for anonymity in the context of performing medical procedures related to an execution. However, it is not difficult to envision a solution that allows for a review of this information without revealing the identity of the specific personnel. For example, a mutually agreed upon independent party could review the professional credentials and licensure of the medical personnel and provide an assurance to interested parties that appropriately

credentialed personnel would be involved.

The amici curiae respectfully request that this Court grant the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,



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(9)

No. 03-6821

Supreme Court, U.S.
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In The Supreme Court of the United States

DAVID NELSON,

Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

United States District Court
Middle District of Alabama
Case No. CV-03-T-1008-N
Nelson v. Campbell

October 6, 2003	Complaint for injunctive and declaratory relief filed by plaintiff David Nelson in U.S. District Court for the Middle District of Alabama, Northern Division.
October 6, 2003	Motion by plaintiff David Nelson to proceed *in forma pauperis*.
October 7, 2003	Telephone conference held before United States District Judge Myron H. Thompson for hearing on plaintiff's motions for preliminary injunction and temporary restraining order and on defendants' oral motion for change of venue and motion to dismiss.
October 7, 2003	Motion to dismiss and motion to change venue filed by defendants Donal Campbell, Alabama Department of Corrections, and Grantt Culliver, Warden, Holman Correctional Facility.
October 7, 2003	Notice of providing information to the court filed by defendants.
October 7, 2003	Motion by plaintiff to amend the complaint.
October 7, 2003	Second notice of providing information to the court filed by defendants.

October 7, 2003	Order of Judge Myron H. Thompson granting plaintiff's motion to proceed *in forma pauperis*.
October 7, 2003	Order of Judge Myron H. Thompson granting motion to amend the complaint.
October 7, 2003	Amended complaint filed by plaintiff.
October 7, 2003	Reply brief filed by plaintiff to defendants' motion to dismiss.
October 7, 2003	Motion for production of documents filed by plaintiff.
October 7, 2003	Memorandum opinion of Judge Myron H. Thompson.
October 7, 2003	Judgment of Judge Myron H. Thompson granting defendants' motion to dismiss, dismissing plaintiff's amended complaint without prejudice and ordering that costs be taxed against the plaintiff.
October 7, 2003	Order of Judge Myron H. Thompson directing that plaintiff's motion for a temporary restraining order and preliminary injunction are denied as moot.
October 7, 2003	Order of Judge Myron H. Thompson denying as moot defendants' motion to change venue.
October 7, 2003	Order of Judge Myron H. Thompson denying plaintiff's motion for production of documents.
October 8, 2003	Notice of appeal filed by plaintiff.

October 8, 2003	Motion to proceed on appeal in forma pauperis filed by plaintiff.
October 8, 2003	Order of Judge Myron H. Thompson granting motion to proceed in forma pauperis on appeal.
October 14, 2003	Motion by plaintiff for transcript at no cost to the plaintiff.
October 14, 2003	Order of Judge Myron H. Thompson granting motion for transcript.
November 6, 2003	Motion by plaintiff's attorney Michael McIntyre to appear pro hac vice.
November 6, 2003	Motion by plaintiff's attorney H. Victoria Smith to appear pro hac vice.
November 12, 2003	Order of Judge Myron H. Thompson granting motions for Michael McIntyre and H. Victoria Smith to appear pro hac vice.

United States Court of Appeals for the Eleventh Circuit
Case No. 03-15095-P
Nelson v. Campbell

October 8, 2003	Appellant David Nelson's brief to the Eleventh Circuit Court of Appeals filed.
October 8, 2003	Motion by appellant for a stay of execution and motion to enjoin the defendants from executing him.
October 8, 2003	Appellees Donal Campbell and Grantt Culliver's brief filed at the Eleventh Circuit Court of Appeals.

October 8, 2003	Per curiam opinion of the Eleventh Circuit Court of Appeals affirming the district court's judgment dismissing David Nelson's complaint. The Eleventh Circuit denied the appellant's motion to enjoin the defendants from executing him and denied the appellant's motion for stay of execution.
October 9, 2003	Petitioner's Petition for Rehearing En Banc filed at the Eleventh Circuit Court of Appeals.
October 9, 2003	Order of the Eleventh Circuit Court of Appeals denying appellant's petition for rehearing en banc and denying as moot the appellant's motion to stay the execution during en banc consideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, vs. DONAL CAMPBELL, In his individual and official capacity as Commissioner of the Alabama Department of Corrections and GRANTT CULLIVER, In his individual and official capacity as Warden of William C. Holman Correctional Facility, Defendants.	)	Civil Action File No. ___

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

DAVID LARRY NELSON hereby submits his Complaint for injunctive and declaratory relief against the Defendants named herein, showing in support of the following:

JURISDICTION

1. This action arises under the authority vested in the Court by virtue of 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §1651, 28 U.S.C. §2201, and 28 U.S.C. §1367.

VENUE

2. Venue is proper pursuant to 28 U.S.C. 1391(b) because one or more of the Defendants resides in the Middle District of Alabama.

PARTIES

3. Plaintiff David Larry Nelson is and has been at all times pertinent to this matter a citizen of the United States of America and a citizen of the State of Alabama. He has been an inmate in the State of Alabama since 1978 and presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama.

4. Defendant Donal Campbell is and has been at all times relevant to this action the Commissioner of the Alabama Department of Corrections.

5. Defendant Warden Grantt Culliver is and has been at all times relevant to this action, the Warden of William C. Holman Correctional Facility in Atmore, Alabama.

FACTUAL ALLEGATIONS

6. The Plaintiff presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama (hereinafter referred to as "Holman").

7. The Plaintiff is scheduled to be executed by lethal injection on October 9, 2003 at Holman at 6:00 p.m.

8. The Plaintiff was previously incarcerated at W. E. Donaldson Correctional Facility in Bessemer, Alabama (hereinafter referred to as "Donaldson").

9. The Plaintiff was transferred to Holman upon his death warrant being issued by the Alabama Supreme Court.

10. Pursuant to Ala.Code 1975 §15-18-82, Defendant Culliver, as the Warden at Holman, shall be the executioner at the Plaintiff's execution and Defendant Campbell (hereinafter referred to as "Defendant D.O.C.") acting in his official capacity of the Commissioner of the Alabama Department of Corrections will provide the necessary "room and appliances to carry out" the Plaintiff's execution.

11. The Plaintiff has severely compromised veins and has encountered problems over the last two decades with prison medical personnel gaining venous access during routine physical examinations.

12. The Plaintiff is unable to attach a copy of his medical records to this pleading in support of the above allegation, because Defendant D.O.C. has refused to allow the Plaintiff access to his own medical records. (See, Correspondence to undersigned counsel Smith from the Alabama Department of Corrections, attached to this pleading as Attachment 1).

13. On at least one occasion, prison medical personnel has relinquished control of medical apparatus to the Plaintiff for the Plaintiff to draw his own blood after failed attempts by the medical personnel to do same.

14. Counsel for the Plaintiff contacted Defendant Culliver the day that the Plaintiff was transferred from Donaldson to Holman and informed Defendant Culliver of the Plaintiff's physical problems regarding his veins and

of concerns regarding the protocol for gaining venous access for the lethal injection procedure.

15. At that time, counsel for the Plaintiff requested that either a private practice physician hired by the Plaintiff be allowed to examine and consult with the Plaintiff regarding venous access for the lethal injection procedure or that a prison physician examine and consult with the Plaintiff regarding same.

16. Defendant Culliver assured counsel for the Plaintiff that he would arrange for a physician to examine and consult with the Plaintiff regarding this issue soon after the Plaintiff's arrival at Holman. (See Correspondence from undersigned counsel Smith to Warden Culliver confirming their telephone conversation, attached to this pleading as Attachment 2).

17. As of the filing date of this pleading, Defendant Culliver has failed to have a physician so examine and consult with the Plaintiff.

18. Defendant Culliver has refused repeated requests that a private physician hired by the Plaintiff be allowed to examine and consult with the Plaintiff.

19. Said refusal is a clear violation of Ala.Code 1975 §15-18-81, which provides in relevant part, " . . . all persons outside the said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business . . . ". A copy of Ala.Code 1975 §15-18-81 is attached to this pleading as Attachment 3.

20. Defendant Culliver furthermore has refused to allow that same private physician to conduct a telephone conference with the medical personnel Defendant Culliver

intends to have perform a venous access procedure immediately prior to the Plaintiff's execution or with any other prison medical personnel.

21. During the telephone conversation referenced in Paragraph 14 above, counsel for the Plaintiff requested from Defendant Culliver a copy of the State of Alabama's protocol for the lethal injection procedure.

22. Defendant Culliver refused to provide counsel for the Plaintiff with same. (See Attachment 2).

23. Furthermore, Defendant Culliver refused to provide any meaningful information concerning the protocol for the lethal injection procedure or for the medical procedure that would have to be implemented to gain venous access to the Plaintiff immediately preceding the execution despite counsel's representation to Defendant Culliver that the Plaintiff had a valid basis for his concerns. (See Attachment 2).

24. It should be noted that counsel for the Plaintiff also contacted Defendant D. O. C. by telephone and then by faxed correspondence to request a copy of Alabama's protocol for the lethal injection procedure and the medical procedure that would have to be implemented to gain venous access to the Plaintiff as a prior to the execution. (See Attachment 4).

25. Defendant D. O. C. denied the request by email message. (See Attachment 5).

26. Defendant Culliver and a prison nurse employed at Holman have met with the Plaintiff on two separate occasions since the Plaintiff's arrival at Holman and have described to the Plaintiff the procedure Defendant Culliver

intends to implement in order to gain venous access prior to the execution.

27. Ironically, this nurse is the same medical personnel referred to in Paragraph 13 above who had to relinquish medical apparatus to the Plaintiff for the Plaintiff to draw his own blood during a routine physical examination.

28. Notably, Defendant Culliver during the first meeting acknowledged to the Plaintiff that the Plaintiff does exhibit compromised veins.

29. Of paramount importance for purposes of this pleading, during that first meeting, Defendant Culliver also informed the Plaintiff that a medical procedure will have to be performed on the Plaintiff prior to the Plaintiff's execution in order for Defendant Culliver to gain venous access.

30. Defendant Culliver furthermore acknowledged to counsel for the Plaintiff that the Plaintiff's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access.

31. Based upon conversations in which counsel for the Plaintiff has engaged with Defendant Culliver and with Defendant D. O. C., counsel for the Plaintiff in good faith submits to this Court that the State of Alabama does not have as part of its lethal injection protocol written medical procedures that comport with contemporary medical standards for gaining venous access in condemned inmates such as the Plaintiff prior to an execution.

32. Furthermore, counsel for the Plaintiff in good faith submits to this Court that Defendant Culliver and

Defendant D. O. C. are designing a medical procedure to be followed as a predicate to the Plaintiff's execution without being qualified to so design such medical procedure.

33. Furthermore, counsel for the Plaintiff in good faith submits to this Court that the State of Alabama is overstepping its authority in attempting to perform medical procedures outside of a medical setting without appropriate medical safeguards in an attempt to carry out the legal procedure of execution.

34. Assuming *arguendo* that this Court finds that it is appropriate for Defendant Culliver and Defendant D. O. C. to design and implement a medical procedure to be performed outside of a suitably equipped medical facility as a predicate to the legal procedure of execution by lethal injection, counsel for the Plaintiff alerts this Court that the procedure as described by Defendant Culliver to the Plaintiff is exceptionally suspect and carries with it a significant risk that the Eighth Amendment's prohibitions against cruel and unusual punishments will be violated by its use.

35. Specifically and as stated above, Defendant Culliver and the aforementioned nurse have met with the Plaintiff together on two separate occasions to describe the medical procedure that Defendant Culliver intends to implement with the Plaintiff to gain venous access.

36. Defendant Culliver and the nurse initially described the medical procedure as (1) involving an incision of approximately 0.5 inch being made in the Plaintiff's arm through which a catheter would be inserted into a vein and (2) being performed at least twenty-four hours in advance of the execution.

37. More recently, however, Defendant Culliver and the nurse informed the Plaintiff that (1) the incision will be approximately two inches in length and will be made either in the Plaintiff's leg or arm, (2) this medical procedure will not be performed until approximately one hour before the execution, and (3) only a local anesthetic will be used during the procedure.

38. Logically, if the State of Alabama had a written protocol for the medical procedure necessary to be performed immediately prior to an execution of condemned prisoners with whom peripheral intravenous access was not possible, there would be no discrepancies between Defendant Culliver's descriptions of the procedure to the Plaintiff.

39. Also troublesome is the fact that Defendant Culliver described the procedure to undersigned counsel on October 3, 2003 as basically being that described in Paragraph 31 above – which involves a two inch incision being made in the Plaintiff and a catheter being inserted through the incision into a vein – but also claimed that the procedure would not be a cut-down procedure.

40. According to Dr. Mark Heath, a licensed physician who is a Board Certified anesthesiologist and assistant professor at Columbia University College of Physicians and Surgeons, the procedure described by Defendant Culliver is precisely a cut-down procedure. (See Paragraph 8 of the Affidavit of Mark Heath, M.D., attached to this pleading as Attachment 6).

41. Clearly, Defendant Culliver does not have the requisite knowledge base to be in charge of designing, performing, or overseeing this medical procedure.

42. From the descriptions of the procedure Defendant Culliver has given the Plaintiff and undersigned counsel and based upon a telephone conversation between undersigned counsel Smith and Mr. Andy Redd of the legal department of the Alabama Department of Corrections, undersigned counsel in good faith believes that Defendant Culliver in fact does intend to perform a cut-down procedure on the Plaintiff to gain venous access prior to the Plaintiff's execution by lethal injection.

43. A cut-down procedure is an invasive and barbaric medical procedure which does not comport with the contemporary practice of medical care. (See Paragraphs 21, 22, 23, and 24 of the Affidavit of Mark Heath, M.D.).

44. If the State of Alabama does intend to perform a cut-down procedure, this clearly would constitute cruel and unusual punishment because this medical procedure is invasive, it may give rise to serious medical complications, it involves unnecessary pain and suffering, it involves the mutilation of the Plaintiff's body, and there are better methods available for a qualified physician to perform on the Plaintiff to gain venous access which would comport with contemporary medical care standards. (See Paragraphs 18, 20, 21, 22, 23, and 24 of Affidavit of Mark Heath, M.D.).

45. According to Dr. Mark Heath, a cut-down procedure involves making a series of surgical incisions through the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached. (See Paragraph 9 of Affidavit of Mark Heath, M.D.).

46. During a cut-down procedure, blood vessels may have to be closed either by the use of cautery or the use of ligatory suture. (See Paragraph 11 of Affidavit of Mark Heath, M.D.).

47. Furthermore, cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain) because otherwise, it would be an extraordinarily disturbing and distressing experience. (See Paragraph 13 of Affidavit of Mark Heath, M.D.).

48. Of great concern is the fact that many complications of the cut-down procedure are well-recognized by the medical community. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

49. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

50. Whenever a cut-down procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).

51. The Defendants have not assured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.

52. Furthermore, the Defendants refuse to supply the Plaintiff with any information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.

53. As Dr. Mark Heath explains, many, if not most, physicians have never personally performed a cut-down procedure and do not possess the requisite skills for competently and safely performing such a procedure. (See Paragraph 14 of Affidavit of Mark Heath, M.D.).

54. Hospitals in the private sector require medical practitioners to be credentialed for the specific procedure of cut-downs for the purpose of safeguarding patients by ensuring that procedures are performed by experienced and competent personnel. (See Paragraph 15 of Affidavit of Mark Heath, M.D.).

55. Subjecting a person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome. (See paragraph 16 of Affidavit of Mark Heath, M.D.).

56. Any person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).

57. In the absence of such a review, *and particularly given Defendant Culliver's refusal to permit such scrutiny*,

there is a complete lack of any reasonable assurance that the medical procedure Defendant Culliver intends to perform on the Plaintiff as a predicate to his execution will be humane. (See Paragraph 17 of affidavit of Mark Heath, M.D.).

58. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[ ] no 'legitimate penological objective'"; prison official may be held liable under Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citations omitted).

59. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff does not comport with evolving standards of decency. *See Gregg v. Georgia*, 428 U.S. 153, 171 (1976) and *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

60. The cut-down procedure the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. *See Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

61. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing alternative methods or altering the procedures employed in the execution process, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.

62. According to Dr. Mark Heath, there is an alternative procedure that the Defendants could utilize in gaining venous access in the Plaintiff that would easily remedy or mitigate the risks of unnecessary pain and suffering inherent in the cut-down procedure Defendant Culliver intends to utilize. (See Paragraphs 20, 21, 22, and 23 of Affidavit of Mark Heath, M.D.).

63. This alternative procedure is referred to by several terms, including percutaneous central line placement, percutaneous central access, percutaneous central venous cannulation, and percutaneous technique. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

64. This procedure has, except in rare circumstances, supplanted the use of the cut-down procedure and is superior to the cut-down procedure in virtually all regards. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

65. This procedure is less invasive, less painful, faster, cheaper, and safer that [sic] the cut-down procedure. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).

66. Because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure.

67. It would be extraordinarily rare to perform a central venous cut-down procedure without first attempting and failing to successfully obtain venous access using this procedure.

68. The Defendants have not articulated a reason for implementing the barbaric cut-down medical procedure on the Plaintiff in lieu of the medical procedure available that meets contemporary standards of medical care.

69. Of great significance and as referenced above, Defendant Culliver will not disclose the training or qualifications of the person(s) responsible for performing either the medical procedure on the Plaintiff that Defendant Culliver has acknowledged must be performed as a predicate to the legal procedure of execution or the legal procedure of execution by lethal injection.

70. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will be present during the requisite medical procedure and/or the legal procedure of execution by lethal injection.

71. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the medical procedure performed on the Plaintiff and during the execution itself raises issues of constitutional importance.

72. The Defendants are deliberately preventing the public, the courts, and the condemned prisoners themselves from knowing any meaningful information about the lethal injection protocol and any accompanying medical procedure protocol that the Defendants intend to use in the killing of citizens of the State of Alabama.

73. Independent public scrutiny undeniably plays a significant and indispensable role in the proper functioning of capital punishment.

74. Public disclosure of Alabama's lethal injection protocol and accompanying mandated medical procedures for gaining venous access are critical in allowing the public to determine whether the punishment of execution by lethal injection in the State of Alabama comports with "the

evolving standards of decency which mark the progress of a maturing society". *Trop v. Dulles*, 356 U.S. 86 (1958).

75. For this Court and for the public to determine whether lethal injection execution in the State of Alabama is being humanely administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners.

76. As it stands now, this Court, the public, and the Plaintiff are being forced to rely upon the very people responsible for designing and administering the protocol and performing the invasive and risky medical procedures for assurances that the protocol and procedures are sound and that they comport with "the evolving standards of decency".

77. in order to pass constitutional muster, an independent body – such as this Court or the public – must be allowed to review the State of Alabama's protocol.

78. It should be stressed that there exists a humane method for gaining venous access in the Plaintiff that does not violate the Plaintiff's Eighth Amendment rights, but Defendant Culliver is adamant that he intends to implement an inhumane method for gaining venous access in the Plaintiff that does violate the Plaintiff's Eighth Amendment rights.

79. Given the fact that Defendant Culliver has conceded that the Plaintiff's execution will mark the first instance of the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to

gain venous access, there exists a substantial risk that the Defendants intend to violate the Eighth Amendment's prohibitions against inflicting cruel and unusual punishments with respect to the Plaintiff.

80. Given the posture that the Defendants have taken regarding the secrecy of the lethal injection protocol and accompanying mandated medical procedures, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in administering the punishment of lethal injection execution to the Plaintiff.

81. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, it is respectfully submitted that this Court cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. *Louisiana ex re. Francis v. Resweber*, 329 U.S. 459 (1947).

82. Failure to provide injunctive relief will result in irreparable harm in that the Defendants will perform the above-described cut-down procedure on the Plaintiff prior to his execution which is scheduled for October 9, 2003 at 6:00 p.m.

CAUSE OF ACTION

COUNT I

Deprivation of Constitutional Rights Under the Eighth Amendment

83. Plaintiff has the right under the Eighth Amendment to the United States Constitution, as applied to states through the Fourteenth Amendment, to be free from cruel and unusual punishments.

84. The actions of the Defendants will result in the deprivation of the Plaintiff's rights as guaranteed by the Eighth Amendment.

State Law Claim

85. By Defendant Culliver refusing to allow a physician to examine and consult with the Plaintiff regarding the likely ability of Defendant Culliver to gain venous access to the Plaintiff as a predicate to the Plaintiff's execution, Defendant Culliver has violated Ala.Code 1975 § 15-18-81.

In Forma Pauperis Status

86. The Plaintiff has been incarcerated since 1978.

87. The Plaintiff previously has been allowed to proceed *in forma pauperis* in the United States District Court for the Northern District of Alabama, the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of the United States.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff requests that this Court provide the Plaintiff with the following relief:

a. Enter an order allowing the Plaintiff to proceed *in forma pauperis* in this proceeding.

b. Enter an order granting injunctive relief and staying the Plaintiff's execution, which is currently scheduled for October 9, 2003 at 6:00 p.m.;

c. Enter an order that directs the Defendants to provide the Plaintiff with the protocol concerning the medical procedure which will be followed to gain venous access as a predicate to the Plaintiff's execution and the legal procedure of execution by lethal injection;

d. Enter an order that directs the Defendants to consult with medical experts and promulgate a protocol concerning venous access that comports with contemporary standards of medical care and the Eighth Amendment to the United States Constitution;

e. Enter an order that directs the Defendants to allow the Plaintiff to meet with his physician pursuant to Ala.Code 1975 § 15-18-81;

f. Enter an order that provides for attorney's fees and costs of litigation under Title 28 of the Federal Code, and 42 U.S.C. 1988; and

g. Such other and further relief as this Court deems just and appropriate.

[SIGNATURES ON THE NEXT PAGE]

/s/ Joe W. Morgan, III by MKM
with express permission
JOE W. MORGAN, III
Alabama Bar No. MOR093
Attorney for Plaintiff

Suite B
600 Robert Jemison Road
Birmingham, Alabama 35209
Telephone (205) 945-8550
Fax No. (205) 945-9005

/s/ Michael Kennedy McIntyre
MICHAEL KENNEDY McINTYRE
Georgia Bar No. 494075
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507 The Grant Building
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Atlanta, Georgia 30303
Telephone (404) 688-0900
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/s/ H. Victoria Smith
H. VICTORIA SMITH
Georgia Bar No. 658605
Attorney for Plaintiff

507 The Grant Building
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Telephone (404) 688-0900
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[Certificate Of Service Omitted In Printing]

ATTACHMENT 1

[SEAL]

STATE OF ALABAMA

DEPARTMENT OF CORRECTIONS

DON SIEGELMAN
GOVERNOR

MICHAEL W. HALEY
COMMISSIONER

April 27, 2001

H. Victoria Smith, Esq.
507 The Grant Building
44 Broad Street N.W.
Atlanta GA 30303

Re: David Larry Nelson
AIS #Z-383

Dear Ms. Smith:

This will acknowledge receipt of your FAX of April 26, 2001, and further advise that I have informed Deputies Attorney General Clay Crenshaw and Michael Billingsley of your request. Pursuant to their instruction, we will require a court order to release these records.

If you have any further questions, would you please refer them to Messrs. Crenshaw and Billingsley.

Sincerely,
/s/ William F. Addison
William F. Addison
Assistant General Counsel

WFA/elu

cc: Clay Crenshaw
Michael Billingsley

ATTACHMENT 2

LAW OFFICE OF
MICHAEL KENNEDY MCINTYRE

507 THE GRANT BUILDING
44 BROAD STREET, NORTHWEST
ATLANTA, GEORGIA 30303-2329

TEL 404.688.0900
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MICHAEL KENNEDY MCINTYRE
mkm@michaelkennedymcintyre.com

H. VICTORIA SMITH
LICENSED IN GA AND SC
hvs@michaelkennedymcintyre.com

August 19, 2003

Warden Grantt Culliver
Holman Correctional Facility
9677 Highway 21N
Atmore, Alabama 36503

Re: David Larry Nelson, Z-383

Dear Warden Culliver:

Thank you for speaking with me today via telephone regarding Mr. Nelson's pending execution. As I stated during that telephone conversation, I am trying to learn as much as possible about the lethal injection procedures currently in use at your facility so that I may knowledgeably consult with Mr. Nelson regarding his upcoming execution. As we discussed, Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins.

Based on our telephone conversation, it is my understanding that you have a written protocol regarding

execution procedures but are unwilling to provide that protocol to me. Also, you assured me that there will be "medical personnel" present during Mr. Nelson's execution, but you would not divulge any descriptions of the "medical personnel" (e.g., an anesthesiologist, a general practice physician, a registered nurse). You indicated that the "medical personnel" would have received "medical training"; however, you would not tell me anything about that training except that it was "medical" in nature. You would not divulge whether that training included instruction in execution methodology. Finally, you could not tell me anything about the "cutdown" procedure that would have to be implemented if the "medical personnel" could not find good veins on Mr. Nelson's arms.

You did agree to have Mr. Nelson evaluated by a physician once Mr. Nelson was transferred to your facility so that the physician could consult with Mr. Nelson about the difficulties that Mr. Nelson might encounter during the execution, and I thank you for agreeing to do so. As I told you, I am sure that such a consultation would alleviate some of the anxiety that Mr. Nelson is currently experiencing regarding the execution. I am assuming that the physician who examines Mr. Nelson will be allowed to review the protocol for the execution procedure so that he or she may speak intelligently about the procedure with Mr. Nelson.

Please contact me if anything in this correspondence is inaccurate. Thank you again for speaking with me.

Sincerely,

/s/ H. Victoria Smith
H. Victoria Smith

ATTACHMENT 3

* * *

ATTACHMENT 4

[Names and Phone Numbers Omitted In Printing]

October 3, 2003

VIA FACSIMILE TRANSMITTAL

Mr. Andy Redd
Alabama Department of Corrections
Legal Department
101 South Union Street
Montgomery,. Alabama 36130
Fax No. (334) 353-3891

Re: Alabama Lethal Injection Protocol

Dear Mr. Redd:

Pursuant to our telephone Conversation earlier today, please accept this correspondence as my formal request that I be provided with a copy of Alabama's lethal injection protocol. As we discussed, I represent Mr. David Larry Nelson, Z-383, who is scheduled to be executed by lethal injection by the State of Alabama on Thursday, October 9, 2003. Due to years of intravenous drug abuse, Mr. Nelson has severely compromised veins and is concerned about the procedure that the protocol dictates should be implemented in gaining venous access.

If you have any questions about this correspondence or my request, please contact me. Thank you for your assistance in this matter.

Sincerely,

/s/ Victoria Smith
H. Victoria Smith

ATTACHMENT 5

Original Message:

From: Redd, Andrew W ARedd@doc.state.al.us
Date: Fri, 3 Oct 2003 13:52:01-0500
To: hvs@michaelkennedymcintyre.com
Subject: Request for Lethal Injection Protoco [sic]/
David Larry Nelson Z-383

Dear Ms. Smith:

I have received and reviewed your request for a copy of the lethal injection protocol and have conferred with my superiors on this matter. I must inform you that we must deny your request.

Andy Redd
General Counsel
---
mail2web – Check your email from the web at http://mail2wel.com/.

ATTACHMENT 6

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

Personally appeared before me, Mark Heath, M.D., who after first being duly sworn stated and affirmed under oath as follows:

1.

My name is Mark Heath, M.D., and I am more than eighteen years of age, *sui juris*, and am competent to give this Affidavit as I have personal knowledge of certain facts relative to the State of Alabama's planned execution of Mr. David Nelson.

2.

I am a physician licensed to practice medicine in the State of New York.

3.

I am a practicing anesthesiologist and am Board Certified in anesthesiology. I am an assistant professor of clinical anesthesiology at Columbia University College of Physicians and Surgeons, and teach I [sic] instruct medical students and residents and fellows in the practice of anesthesiology. My routine practice includes obtaining intravenous access in virtually all of my patients. Additionally, the majority of my patients require the placement of central venous catheters, and I personally supervise or

perform the placement of these catheters. I conduct research in the field of anesthesiology sponsored by the National Institutes of Health and publish in the field of anesthesiology. My curriculum vitae is attached to this Affidavit.

4.

I was contacted by Mr. David Nelson's attorneys regarding their concerns about Mr. Nelson's severely compromised veins and their concern that the State of Alabama's execution team might encounter problems in attempting to gain venous access with Mr. Nelson during the lethal injection execution process.

5.

It is my understanding that gaining peripheral venous access to Mr. Nelson has been difficult during medical procedures conducted on Mr. Nelson in the past by prison personnel.

6.

It is my understanding that the warden who will be in charge of the execution at Mr. Nelson's prison has acknowledged to Mr. Nelson's attorneys that Mr. Nelson's compromised veins will present a novel situation for the State of Alabama's execution team in gaining venous access and will require that team for the first time to conduct a separate medical procedure prior to the execution.

7.

It is my understanding that both the warden of Mr. Nelson's prison and the Alabama Department of Corrections have refused to provide Alabama's written protocol for lethal injection executions to Mr. Nelson or his attorneys. As such, it is unknown by anyone other than those State of Alabama employees authorized to be in possession of the written protocol what procedures, if any, the protocol directs medical personnel to follow upon being presented with a condemned person such as Mr. Nelson with whom peripheral intravenous access is not possible.

8.

It is my understanding that the warden at Mr. Nelson's prison intends to gain venous access immediately preceding the execution by making a surgical incision of approximately two inches in length either in Mr. Nelson's leg or on his arm and inserting a catheter into one [sic] Mr. Nelson's veins through that incision. This procedure is known as a cut-down procedure.

9.

A cut-down procedure involves making a series of surgical incisions though the skin, through the underlying connective tissue, through the underlying layers of fat, through the underlying layers of muscle, until the region surrounding a large vein is reached.

10.

A cut-down procedure can be performed on the arm or leg, or in the groin, neck, or chest. Patients who have been

exposed to chronic intravenous chemicals, whether chemotherapy or drugs of abuse, often have severe scarring of the veins in the arms and legs, and cut-downs have to be performed in the neck, chest, or groin.

11.

During the procedure multiple small arteries and veins in the fat and muscle layers are transected and release blood; these blood vessels need to be closed either by the use of cautery or the use of ligatory suture. Tissue needs to be dissected away from the vein, usually using a technique called blunt dissection.

12.

If cautery is used, smoke will rise from the area of the incision and the room will smell of burning tissue, flesh, and blood. Cautery also makes a buzzing and sizzling sound as the water in the blood and tissue boils.

13.

When performed electively, which is quite uncommon (see below), cut-down procedures are usually performed under deep sedation that includes the administration of potent intravenous analgesics (drugs that block pain), because it would otherwise be an extraordinarily disturbing and distressing experience.

14.

A cut-down procedure is a surgical procedure that should be performed only by a physician or practitioner

who is specifically trained and credentialed to perform that procedure. Many, or perhaps most, physicians have never personally performed a cut-down procedure. In particular, physicians who have not received postgraduate training in surgery or cardiology or emergency medicine are unlikely to be experienced and proficient in performing this procedure. Therefore, merely stating that a physician will be present at the execution fails to provide any assurance to the condemned prisoner that the procedure will be performed safely and competently.

15.

In the hospital setting medical practitioners are credentialed for specific procedures, including cut-down procedures. This system has been instituted to safeguard patients by ensuring that procedures are performed by experienced and competent personnel.

16.

Regardless of their status in society, no individual should be subjected to a surgical procedure such as a cut-down at the hands of an inexperienced practitioner. Any plan that involves subjecting any person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and a botched outcome.

17.

Any patient or person undergoing an elective cut-down procedure should be entitled to review the credentials, certification, and training record of the person or

persons who will be performing the procedure. In the absence of such a review, and in particular in the presence of a refusal to permit such scrutiny, there is a complete lack of any reasonable assurance that the procedure will be humane.

18.

Complications of the cut-down procedure are well-recognized and are described in basic clinical textbooks. These complications include:

(a) Severe hemorrhage (bleeding) – the cut-down procedure involves a deep incision and dissection in the area of large blood vessels. Laceration of these blood vessels may result in bleeding that can obscure the surgical field and make surgical repair difficult. The likelihood of this occurring is increased if the proper equipment is not available. This equipment would include suction, surgical lighting, surgical instruments, and cautery. In the hospital setting a physician is able to quickly summon assistance should a hemorrhagic complication situation arise. There has been no assurance for Mr. Nelson that experienced and competent assistance will be readily available to treat the complication of severe hemorrhage. Death by hemorrhage and exsanguination (the emptying of blood from the body) is extremely distressing. It is accompanied by a sense of asphyxiation and terror, and would be inhumane were it to occur as the result of a deliberate and premeditated act.

(b) Pneumothorax – a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called pneumothorax. This complication involves the entry of air into the potential space

between the lungs and the inner wall of the chest. This complication causes severe distress, including the sensation of suffocation, and if untreated often results in death by asphyxia and cardiovascular collapse. Death by pneumothorax would be agonizing and, if caused by a deliberate and premeditated act, would be inhumane. The treatment of pneumothorax involves the placement of a tube called a "chest tube", which when connected to a source of suction serves to evacuate the air from the space between the lung and the chest wall. Placement of a chest tube requires training and experience. It is likely that the majority of physicians, particularly those who have not completed post graduate surgical training, have never placed a chest tube. Placement of a chest tube also requires the immediate availability of the proper medical equipment and supplies, and the availability of a source of suction.

(c) Cardiac dysrhythmia – a cut-down procedure, when used to obtain access to the internal jugular vein (in the neck) or the subclavian vein (behind the collar bone), can cause a complication called cardiac dysrhythmia. This is an abnormality of the electrical activity of the heart which can cause impaired pumping of blood and hemodynamic collapse (also called shock). The cut-down procedure causes this complication because the tip of the catheter can irritate the atrium or ventricle, the chambers of the heart, and trigger abnormal electrical activity. Recognition of this common complication requires the placement of EKG leads prior to performing the procedure, and requires frequent checking of the EKG trace while the catheter is being advanced. Treatment of life threatening dysrhythmias requires the use of the appropriate drugs and/or the use of electrical shocks from a device called a defibrillator.

Failure to prepare for the diagnosis and treatment of the complication of dysrhythmia would place a patient, or anybody undergoing a cut-down procedure in the internal jugular vein or the subclavian vein, at risk of experiencing hemodynamic collapse. This is a terrifying experience that is often accompanied by severe chest pain, nausea, vomiting, and a sense of suffocation or asphyxia.

(d) Pain – because of the invasive nature of the procedure, including blunt and sharp dissection through successive layers of skin, fat, and muscle, a cut-down procedure can be extremely painful. The risk of pain is greatly increased if the procedure is performed by personnel who are not well-experienced in surgical techniques.

19.

The obtaining of central venous access is commonly performed in therapeutic settings throughout the United States and the world.

20.

The cut-down technique is rarely used in the elective surgical setting because it has been supplanted by superior techniques that are safer, less painful, less invasive, faster, cheaper, and easier to perform. In the elective setting, the cut-down technique is now almost exclusively reserved for the placement of cardiac pacemakers and for harvesting veins for coronary surgery. Elective cut-down procedures are performed in fully equipped operating rooms or catheterization labs under deep sedation or general anesthesia.

21.

Given the near universal adoption of superior techniques, there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be.

22.

Given the above-described risks involved with performing a cut-down procedure in an attempt to gain venous access in a patient with whom peripheral intravenous access attempts have failed, such a procedure does not comport with the contemporary practice of medical care and is highly unlikely to be selected and performed by a physician practicing in a therapeutic health care setting.

23.

The contemporary practice of medicine usually employs a hollow needle and a wire to secure central intravenous access. This technique is referred to by several terms, including but not limited to "percutaneous central line placement", "percutaneous central access", "percutaneous central venous cannulation", and "percutaneous technique". This technique has, except in rare circumstances, supplanted the use of the cut-down technique. The percutaneous technique is superior to the cut-down technique in virtually all regards. Compared with the cut-down technique, the percutaneous technique is less invasive, less painful, faster, cheaper, and safer. Because of its more widespread use, far more physicians and health care professionals are proficient and competent in performing

the percutaneous technique. It would be extraordinarily rare to perform a central venous cut-down procedure without first attempting, and failing, to successfully obtain intravenous access using the percutaneous technique. In experienced hands the failure rate using the percutaneous technique is extremely low.

24.

Gaining venous access is a medical procedure that is separate from the legal procedure of execution by lethal injection. The State of Alabama's protocol regarding venous access procedures, therefore, should comport with contemporary standards of medical care. To meet contemporary standards of medical care, the protocol should not include a cut-down procedure.

25.

For the reasons described above, in order to approach or meet a medically acceptable standard the execution protocol should explicitly articulate and define the requisite credentials, licensure, training, and experiences of the personnel who are scheduled to secure intravenous access. While such definition should apply to all lethal injection procedures, it should in particular apply to lethal injection procedures in which the establishment of intravenous access is expected and foreseen to be challenging and painful.

SO SAYETH AFFIANT.

/s/ Mark Heath
MARK HEATH

Sworn to and subscribed before me
This 6th day of October, 2003
/s/ Lia Pascale
Notary Public
My commission expires: 7/21/07

Curriculum Vitae

1) Date of preparation: October 6, 2003

2) Name: Mark J. S. Heath
   Birth date: March 28, 1960
   Birth place: New York, NY
   Citizenship: United States, United Kingdom

3) Academic Training:

Harvard University	B.A., Biology, 1983
University of North Carolina, Chapel Hill	M.D., 1987
Medical License	New York: 177101-1

4) Traineeship:

1987–1988	Internship, Internal Medicine, George Washington University Hospital, Washington, D.C.
1988–1991	Residency, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY
1991–1993	Fellowship, Anesthesiology, Columbia College of Physicians and Surgeons, New York, NY

5) Board Qualification:

   Diplomate, American Board of Anesthesiology, October 1991.

6) Military Service: None

7) Professional Organizations:

American Society of Anesthesiologists
International Anesthesia Research Society
Society of Cardiovascular Anesthesiology

8) Academic Appointments:

1993–2002	Assistant Professor of Anesthesiology, Columbia University, New York, NY
2002–present	Assistant Professor of Clinical Anesthesiology, Columbia University, New York, NY

9) Hospital/Clinical Appointments:

1993–present	Assistant Attending Anesthesiologist, Presbyterian Hospital, New York, NY.

10) Honors:

Magna cum laude, Harvard University
Alpha Omega Alpha, University of North Carolina at Chapel Hill
First Prize, New York State Society of Anesthesiologists Resident Presentations, 1991

11) Fellowship and Grant Support:

Foundation for Anesthesia Education and Research, Research Starter Grant Award, Principal Investigator, funding 7/92-7/93, $15,000.

Foundation for Anesthesia Education and Research Young Investigator Award, Principal Investigator, funding 7/93-7/96, $70,000.

NIH KO8 "Inducible knockout of the NK1 receptor"
Principal Investigator, KO8 funding 12/98-11/02,
$431,947 over three years
(no-cost extension to continue through 11/30/2002)

NIH RO1 "tachykinin regulation of anxiety and stress responses"
Principal Investigator, funding 9/1/2002-8/30/2007
$1,287,000 over 5 years

12) Departmental and University Committees:

Research Allocation Panel (1996-2001)
Institutional Review Board (Alternate Boards 1-2, full member Board 3)
(2003-present)

13) Teaching:

Lecturer and clinical teacher: Anesthesiology Residency Program, Columbia University and Presbyterian Hospital, New York, NY

Advanced Cardiac Life Support Training

Invited Lecturer:

NK1 receptor functions in pain and neural development, Cornell University December 1994

Anxiety, stress, and the NK1 receptor, University of Chicago, Department of Anesthesia and Critical Care, July 2000

Anesthetic Considerations of LVAD Implantation, University of Chicago, Department of Anesthesia and Critical Care, July 2000

NK1 receptor function in stress and anxiety, St. John's University Department of Medicinal Chemistry, March 2002

Making a brave mouse (and making a mouse brave), Mt. Sinai School of Medicine, May 2002

Anesthetic considerations of LVAD implantation. Recurrent lecture at Columbia University LVAD implantation course.

14) Grant Review Committees: None

15) Publications:

Original peer reviewed articles

* Santarelli, L., Gobbi, G., Debs, P.C., Sibille, E. L., Blier, P., Hen, R., **Heath, M.J.S.** (2001). Genetic and pharmacological disruption of neurokinin 1 receptor function decreases anxiety-related behaviors and increases serotonergic function. **Proc. Nat. Acad. Sci.**, 98(4), 1912-1917.

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* **Heath, M.J.S.**, Lints, T., Lee, C. J., Dodd, J. (1995). Functional expression of the tachykinin NK_1 receptor by floor plate cells in the embryonic rat spinal cord and brainstem. **Journal of Physiology** 486.1, 139-148.

* **Heath, M.J.S.**, Womack M. D., MacDermott, A. B. (1994). Subsance P elevates intracellular calcium in both neurons and glial cells from the dorsal horn of the spinal cord. **Journal of Neurophysiology** 72(3), 1192-1197.

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Kao, J., Houck, K., Fan, Y., Haehnel, I., Ligutti, S. K., Kayton, M. L., Grikscheit, T., Chabot, J., Nowygrod, R., Greenberg, S., Kuang, W.J., Leung, D. W., Hayward, J. R., Kisiel, W., **Heath, M. J. S.**, Brett, J., Stern, D. (1994). Characterization of a novel tumor-derived cytokine. **Journal of Biological Chemistry** 269, 25106-25119.

Dodd, J., Jahr, C.E., Hamilton, P.N., **Heath, M.J.S.**, Matthew, W.D., Jessell, T.M. (1983). Cytochemical and

physiological properties of sensory and dorsal horn neurons that transmit cutaneous sensation. **Cold Spring Harbor Symposia of Quantitative Biology** 48, 685-695.

Pinsky, D.J., Naka, Y., Liao, H., Oz, M. O., Wagner, D. D., Mayadas, T. N., Johnson, R. C., Hynes, R. O., **Heath, M.J.S.**, Lawson, C.A., Stern, D.M. Hypoxia-induced exocytosis of endothelial cell Weibel-Palade bodies. **Journal of Clinical Investigation** 97(2), 493-500.

Case reports none

Review, chapters, editorials

* **Heath, M.J.S.**, Dickstein, M. L. (2000). Perioperative management of the left ventricular assist device recipient. Prog Cardiovasc Dis.; 43(1): 47-54.

* Dickstein, M.L., Mets B, **Heath M.J.S.** (2000). Anesthetic considerations during left ventricular assist device implantation. Cardiac Assist Devices pp 63-74.

* **Heath, M.J.S.** and Hen, R. (1995). Genetic insights into serotonin function. **Current Biology** 5.9, 997-999.

* **Heath, M.J.S.**, Mathews D. (1990). Care of the Organ Donor. **Anesthesiology Report** 3, 344-348.

* **Heath, M.J.S.**, Basic physiology and pharmacology of the central synapse. (1998) **Anesthesiology Clinics of North America** 15(3), 473-485.

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Heath, M.J.S., King, T., Debs, P.C., Davis M., Hen R., Barr G. (2000). NK1 receptor gene disruption alters the development of nociception. Anesthesia and Analgesia; 90; S315.

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Heath, M.J.S., Lee C.J., Dodd J. (1994). Ontogeny of NK1 receptor-like immunoreactivity in the rat spinal cord. Society for Neuroscience Abstracts; 20; 115.16.

Heath, M.J.S., Berman M.F. (1991) Isoflurane modulation of calcium channel currents in spinal cord dorsal horn neurons. Anesthesiology 75; 3A; A1037.

IN THE UNITED STATES DISTRICT COURT
FOR
THE MIDDLE DISTRICT OF ALABAMA

DEATH PENALTY CASE

DAVID LARRY NELSON

VS.

CIVAL [sic] ACTION
NO. 03-T-1008-N

DONAL CAMPBELL, et al.

IN-CHAMBERS TELEPHONE CONFERENCE RE: MOTION FOR PRELIMINARY INJUNCTION MOTION FOR TEMPORARY RESTRAINING ORDER MOTION FOR CHANGE OF VENUE MOTION TO DISMISS

* * *

BEFORE:	The Hon. Myron H. Thompson
HEARD AT:	Montgomery, Alabama
HEARD ON:	October 7, 2003
APPEARANCES:	Joe Morgan, Esq. Michael McIntyre, Esq. H. Victoria Smith, Esq. Adam Plant Esq. Michael Billingsley, Esq. Clay Crenshaw, Esq.

* * *

[3] WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HEARD BEFORE THE HON. MYRON H. THOMPSON ON OCTOBER 7, 2003 AT THE UNITED STATES COURTHOUSE IN MONTGOMERY, ALABAMA:

THE COURT: Hello, Counsel? This is Nelson versus Campbell. 03-T-1008-N. This is a death penalty case.

Let me call the list of the attorneys. Representing the petitioner – or plaintiff, I should say, I have is that Mr. Joe Morgan?

MR. MORGAN: Your Honor.

THE COURT: Mr. Michael McIntyre?

MR. McINTYRE: Yes, Your Honor.

THE COURT: Ms. Victoria Smith?

MS. SMITH: Yes, Your Honor.

THE COURT: And representing the defendants are Mr. Billingsley?

MR. BILLINGSLEY: Yes, sir.

THE COURT: And Mr. Crenshaw?

MR. CRENSHAW: Yes, Your Honor, I'm here.

THE COURT: Because time is of the essence here – I believe the execution is set for Thursday at what time?

MR. McINTYRE: It's at six p.m. at you. time on Thursday, Your Honor.

THE COURT: Okay. Because the execution is [4] set for six p.m. on Thursday, time is of the essence.

The first thing I'd like to do is just entertain any motions at this time. I'll entertain any motions from the

plaintiff first. Are you asking for, for instance, a T. R. O., a preliminary injunction, permanent injunction or what?

MR. McINTYRE: Your Honor, we've asked in our prayer that you stay the execution, but I guess our request at this time would be a motion for preliminary injunction and we can put that in writing if we needed to.

THE COURT: Okay. Preliminary injunction. I assume you want a T. R. O., too?

MR. McINTYRE: Yes, sir.

THE COURT: Okay. What's your theory for a T. R. O. and a preliminary injunction?

MR. MCINTYRE: I guess our primary theory is that the State of Alabama is planning a medical procedure which we think violates the Eighth Amendment. Right now they're planning to do that on Thursday. Obviously if that's done, it can't be undone and it will be irreparable harm if it is done.

THE COURT: Okay. Any motions from the defendants?

MR. BILLINGSLEY: We'll be filing a motion [5] to dismiss, and depending on what time we get finished here, we'll probably have it over to the court by about the lunchtime.

THE COURT: Okay. Just a motion to dismiss?

MR. CRENSHAW: Judge, we also plan to file a motion for change of venue, and that most likely will be filed within the hour.

THE COURT: Okay. Well I will consider the motions as pending right now. Why don't you let me know your theory regarding your motion for change of venue.

MR. CRENSHAW: Your Honor, the defendants believe that venue is proper in the Southern District of Alabama pursuant to 13 – to Title 28, section 1391(b)(2). That section states that venue is proper in the district where substantial part of the events or omissions giving rise to the claim occurred.

In this case, the plaintiff is located in Holeman [sic] prison. The warden who is designated by statute as the executioner is located at Holeman [sic] prison. The execution is scheduled to occur at Holeman [sic] prison. The plaintiff's complaint is replete with references to witnesses and facilities that are at Holeman [sic] prison.

So for that reason, the defendants assert [6] that venue is proper in the Southern District. The defendants have to concede that venue may be proper in the middle District because the commissioner does reside here, but as we stated, all of the witnesses, all of the events and activities giving rise to this claim occurred in the Southern District. So the defendants will assert in the motion for change of venue that venue is proper in the Southern District.

THE COURT: What witnesses are in the Southern District, can you identify those for me?

MR. CRENSHAW: Well it would be my understanding that the witnesses would be the warden. I believe there were conversations that took place between the warden and Mr. Nelson. And I believe there could be a witness, a registered nurse, I believe, who is employed by

NaphCare, which is the private medical provider for the prisons, is located at Holeman [sic]. I believe the plaintiff's complaint refers to medical records I believe that are at Holeman [sic].

THE COURT: Who is in charge of making decisions about the release of medical protocol?

MR. CRENSHAW: Regarding the execution, Your Honor?

THE COURT: Yes, mm-hmm.

[7] MR. CRENSHAW: Well, it's my understanding – the protocol, I believe, and Mr. Billingsley is going to address this, but I believe the protocol that is going to be planned for this execution is a little different than the ones that we've had, or the three previous executions that have occurred by lethal injection.

THE COURT: Would you tell me the difference?

MR. BILLINGSLEY: Well, what we're going to provide with our motion to dismiss is we have an affidavit from Warden Culliver where he states that he has contracted with a medical doctor to do the procedure that will be necessary, assuming that Mr. Nelson does have compromised veins and that they cannot get an IV going in the normal fashion. And he states that the doctor has informed him they're going to go through three steps.

The first step would be to try to connect the IV into the the [sic] femoral vein which is a vein in the thigh. And it's my understanding that's similar to an IV stick to anywhere else, it's just in the leg rather than in the arm. We don't have any reason to believe that that wouldn't work. My information is that sometimes it won't work if

the individual is obese, but it's my understanding that Mr. Nelson is a [8] regular size guy. He doesn't have that problem.

But if it doesn't work, then they're going to attempt to do it through a vein in the neck. And, again, that would be the external carotid artery – I mean vein. Again, there is no reason to expect that that wouldn't work. This doctor has informed Warden Culliver that he's done these procedures, I believe his affidavit says, hundreds of times.

At that point if these two for whatever reason procedures didn't work, then they would move to do what had been described as the cutdown procedure, which is to make an incision in the upper arm to obtain a vein that way.

THE COURT: What is the name of this doctor who signed the affidavit?

MR. CRENSHAW: Your Honor, we don't know. I think there should be some confidentiality to that.

THE COURT: Okay. Is the doctor located in Mobile or in the Southern District? Can you at least say that?

MR. CRENSHAW: Your Honor, my understanding is the doctor is located in the Southern District. And I believe Mobile, Your Honor.

THE COURT: Okay. Now the medical personnel who will perform the procedure, are they located in [9] Montgomery, or in the Middle District or in the Southern District?

MR. CRENSHAW: Your Honor, it's my understanding that they're in the Southern District, but I would have to talk to the warden about who was going to be there.

THE COURT: What medical personnel will be there?

MR. CRENSHAW: Yes, Your Honor.

THE COURT: Okay. Is most of the decision-making on this, will most of it be done by the warden, Culliver, or Commissioner Campbell?

MR. CRENSHAW: Your Honor, it's my understanding that the warden and the commissioner are consulting with each other. By statute, of course, the warden is the executioner.

THE COURT: What statute says that?

MR. CRENSHAW: I believe it's section 15-18, and I'm looking for the specific subsection.

MR. McINTYRE: Judge, it's 15-18-82.

THE COURT: Okay. Now I'll hear from the plaintiff as to why the case should not be transferred to the Southern District.

MR. McINTYRE: Well first, Your Honor, as Mr. Crenshaw acknowledges, the commissioner is an [10] appropriate defendant. And under 28 U.S.C. 1391(b)(1), it says a judicial district where any defendant resides, if all defendants reside in the same state is an appropriate venue.

THE COURT: Right. I don't think this is a question of an inappropriate venue. The question is, is the venue more appropriate in the Southern District.

MR. McINTYRE: And let me address that, Your Honor. Judge, this whole case is not about the execution. This whole case is about a medical surgical procedure that the D. O. C. plans to use for the first time before an execution. And our position is if all of the decisions about that are being made in Montgomery. I can't believe for a second that the warden is making medical decisions about how to gain venous access.

And let me just say one other thing, Judge. Originally, the warden had told us that this procedure was going to occur twenty-four hours before the execution. Only on Friday did he inform us, and Mr. Nelson, that it would be performed prior to the execution, I guess within maybe an hour of the execution. It just seems to us that they're making this up as they go along. And if things go – I mean, [11] this is a barbaric procedure.

A cutdown procedure is a barbaric procedure. And if it's not done correctly, things can go wrong very quickly; there will be a lot of pain, suffering, maybe even death. But, you know, what we have tried to do is we simply tried to find out what protocol is and they, of course, have never given us, the protocol.

I'm assuming they have a protocol for this procedure, but I don't even know that for sure. We would certainly think they would have a written protocol for this. But I think significantly this issue has never come up before. They have never had to deal with it before. And certainly in terms of looking out for our client, we want to make sure it's done absolutely as humanely as possible.

THE COURT: Other than the commissioner, who is located in the Middle District of Alabama?

MR. McINTYRE: Judge, I guess in order to answer that question I would need to know exactly what the D. O. C. has been doing to deal with this unique situation. And they have been aware – I mean, maybe they're not going to concede this, but we've been talking to the warden on and off ever since Mr. Nelson was transferred to Holeman [sic]. And everyone has always acknowledged that this was going to be a problem. And [12] the issue was just how can we deal with the problem.

So, I am sure – I mean, I would certainly expect a decision of this magnitude, that it's being made in Montgomery either by medical professionals in Montgomery, certainly by officials of the Department of corrections, but I really think what's happening in Atmore is simply ministerial. But really the decision-making of this is in Montgomery.

Certainly I would expect the protocol was devised and created and promulgated in Montgomery.

THE COURT: What do you have to support that?

MR. McINTYRE: What do I have?

THE COURT: Yes.

MR. McINTYRE: I'm just assuming that, Judge. I don't believe that a protocol for all executions would have been done by a warden of an institution. I mean, I'm assuming that would have been done in Montgomery. And of course we're asking the Court to require them to

disclose the protocol for us to be able to look at the protocol and see what actually is supposed to happen.

I'm assuming that's written down somewhere, and if that protocol doesn't meet the standards of the Eighth Amendment, to change the protocol. That's our request. obviously, for any of that to happen, that [13] would happen in Montgomery. It would not be Warden Culliver.

THE COURT: The document that the defendants say they're going to file this afternoon establishing how the vein will be located, is that the protocol you're seeking?

MR. McINTYRE: Judge – Well, I mean we would like to have the complete protocol concerning lethal injection. Now the reality is, as I just said to you, we are focusing right now on this medical procedure. So if they provided us any and all of the protocol pertaining to that procedure, that would certainly suffice for our request.

THE COURT: Well I understood from what Defense Counsel said that the cutdown would only be used if the other two procedures did not work.

MR. McINTYRE: Well, Your Honor, this is my concern about this, and in some reasons this is why I've become much more concerned about this since we talked to the warden on Friday and he changed his mind about the timing of this.

When the warden was planning to do this twenty-four hours in advance, he assured us, he assured Mr. Nelson, that he had this under control. Now that he has moved it to, say, the hour before the [14] execution – and I'm assuming that this part of the procedure, the execution procedure, will not be public and certainly Mr. Billingsley can

tell me if I'm wrong, but I'm assuming that this is going to be done privatley [sic] without any scrutiny, and they are simply going to be cutting on Mr. Nelson, doing whatever they have to do in order to insert a catheter somewhere.

And that is – there's not going to be any scrutiny of that process. And I think, you know, my concern, Judge, and they can tell us on the phone right now we're going to do this and then we're going to try that and then we're going to have to do this. Like I said, I'm assuming it's pursuant to a written procedure, and I'm assuming a doctor is going to do it. But is this a doctor who is competent to do a cutdown procedure? We can go into great detail about a cutdown procedure in an affidavit from our expert.

This is not a simple procedure, and this is not a procedure that just anybody can do. So, you know, having no details of exactly what they plan to do until Mr. Billingsley just gave us one description, I think anybody who thinks that the normal procedure for finding a vein is going to work is really being very inconsistent with what the warden and the nurse at Holeman [sic] have said from day one ever since [15] Mr. Nelson got there. I don't think that's realistic.

And so, if he's saying, you know, if one and two don't work, then we go to cutdown, I can pretty much assume we're going to cutdown.

THE COURT: Why should we assume that?

MR. McINTYRE: Because everything that the people at Holeman [sic] have told us is that it is going to be extremely difficult to gain venous access with Mr. Nelson.

And if that wasn't the case, none of this would be happening.

MR. CRENSHAW: Your Honor may I respond very briefly?

THE COURT: Go ahead.

MR. CRENSHAW: The problem is, as I understand it, is Mr. Nelson was an IV drug user and he used those drugs in his lower arms and hands. And I think that's the problem in gaining venous access to those areas of his body. And certainly, you know, those problems won't exist if the medical personnel tried to attach a direct line or a direct IV line to other parts of his body.

As far as the written protocol that's going to occur for this particular execution as Mr. Billingsley said, the defendants will be filing the affidavit of Grannt [sic] Culliver with our motion to [16] dismiss, and that outlines that particular protocol. And, again, there's no Constitutional requirement that the prisons use a doctor, and I think there are cases from other jurisdictions where physicians' assistants and even EMTs are being used to do some of these procedures.

But, again, you have to remember that this doctor, as Your Honor has already recognized, is going to just attach the direct line to the femoral vein, which is just an IV stick in a different part of the body is all it is, and for whatever reason if that doesn't work and that's, you know, of course it's expected to work and we're trying to obtain an affidavit from another doctor that talks about how that particular procedure should be successful. And the only time it's not is if the person is obese in the typical kind of situation.

But, again, Your Honor, it said that the second thing that will be tried is to put the IV in the carotid vein – I believe it's the carotid vein – in the neck.

And only the third procedure, I don't now if it's a cutdown procedure or not, but all it is, Your Honor, is a two inch incision and then an IV is attached to the vein. And I believe that vein is in [17] the upper arm.

MR. McINTYRE: Your Honor, can I say something?

MR. CRENSHAW: Your Honor, I'm sorry, can you let me just complete or respond to one other point that Mr. McIntyre made?

As far as the timing of this event, Mr. McIntyre, I think, is attaching significance to that just to try to create some issue for you. And I don't know that the prison could begin the execution, which I think attaching an IV line would be doing that, before our execution warrant is valid. So in my opinion, I don't know that the prison could begin the execution procedure before our warrant begins to run, which would be at twelve on [sic] one a.m. on Thursday.

So, and again, I think that's just an issue that Mr. McIntyre is just trying to bring up to create some controversy here.

THE COURT: Okay. Now that's twelve oh one on Thursday?

MR. McINTYRE [sic]: [MR. CRENSHAW:] Your Honor, our warrant is valid for one twenty-four hour period.

THE COURT: Right.

MR. McINTYRE [sic]: [MR. CRENSHAW:] Even though it's valid for that whole day, as Mr. McIntyre did say, that the [18] execution is scheduled for six p.m.

THE COURT: Okay. I want to get back – You said the warrant is at twelve oh one a.m.?

MR. BILLINGSLEY [sic]: [MR. CRENSHAW:] I'm sorry. I didn't mean to create confusion. Our warrant is valid for a twenty-four hour period, and it begins to run at twelve oh one a.m. on Thursday and expires at eleven fifty-nine p.m. that night.

THE COURT: Oh. Okay.

MR. BILLINGSLEY [sic]: [MR. CRENSHAW:] And the execution is scheduled for six o'clock p.m. on Thursday. My point in that was that in my opinion I don't think the medical personnel at Holeman [sic] could begin the procedure before our execution warrant was valid.

And that's all I have, Your Honor.

THE COURT: Okay. I'd like the defendants to get to me the location of the medical personnel who will perform the procedure.

MR. CRENSHAW: Yes, Your Honor.

THE COURT: Go go ahead. Who is speaking now?

MR. McINTYRE: Michael McIntyre, Your Honor.

THE COURT: Go ahead.

MR. McINTYRE: Your Honor, in terms of, I mean I understand what Mr. Crenshaw is saying that if [19] their window doesn't start until twelve oh one, this is not something that came from me. The fact that they were

planning to insert the catheter twenty-four hours before the execution was totally from the warden. That's what he told Mr. Nelson, that's what he told us. And so that did not come from me. That's not me making anything up, and Mr. Crenshaw can talk to the warden about that if he thinks I'm making that up.

But more importantly, judge, what we're doing here, and it sounds like maybe the state is going to submit affidavits in their pleading from people who have never even seen Mr. Nelson. When we called Warden Culliver before Mr. Nelson was transferred, we asked him – I think this is confirmed in a letter in our pleadings – we asked him would he please have a doctor examine Mr. Nelson so we could determine the extent of the problem. So we could, as his lawyers, so we could determine if there is really going to be a problem or is it not going to be a problem.

The warden said he would let Mr. Nelson be seen by a physician. That never happened. We have our own physician who we wanted to see Mr. Nelson. The warden would not allow that to happen. We asked [20] the warden if he would let our doctor talk to the nurse who was dealing with this at the institution. He wouldn't let that happen. We asked the warden if he would let our doctor talk to his doctor. He wouldn't let that happen.

You know, if the state would like to have their own expert go in and evaluate Mr. Nelson, that would be fine with me. I'd like for our person to see him too. But, you know, I don't think we should speculate, we shouldn't speculate based upon standard operating procedures about what's going to happen. What should have happened was when Mr. Nelson got to Holeman [sic], he should have been evaluated by a competent qualified physician, and

that person should have said this is how we can do this. And then we wouldn't be having this guesswork at the end of the day.

I mean, to do this procedure, which is very complicated, which is totally uncertain right now, just before the execution, seems to me to be a total disaster. And I think cruel and unusual. But I don't think that the court should be in a position of merely speculating what Mr. Nelson's venous situation is. I mean, that's something that could be determined and then we could know exactly what's going to have to happen.

[21] THE COURT: Okay. Now the only question that's before me now is the venue issue, not the merits.

I want to move on, however, to the motion to dismiss that the defendants have announced to the court. What's the basis of that motion? Who will speak for the defendants?

MR. BILLINGSLEY: This is Michael Billingsley, Your Honor. There is really two bases and they're separated into one being the federal claim and one being the state claim regarding the state statute. We're going to assert, or are asserting, Your Honor, that the court does not have jurisdiction to consider the complaint and would move for dismissal on that ground.

The first ground regarding the federal claim is that this claim is attacking the constitutionality of Alabama's method of execution and, therefore, should have been – or should be construed as a habeas petition and is subject to the rules governing second and successive habeas petitions.

We think there is Eleventh Circuit law that's controlling on this question, and those cases will be cited in the state's motion. But to just mention a couple of them, Hill v. Hopper is a case [22] where an inmate challenges the Constitutionality via electrocution in the District Court, and I believe it was Your Honor that dismissed it as being the functional equivalent of a second habeas petition. And that was upheld by the Eleventh Circuit.

More recently, a case styled Fugate v. Department of Corrections, the cite is 301 Federal 3d. 1287 was a claim from Georgia regarding lethal injection, and the District Court dismissed, and I'll quote from the opinion, the complaint was that – Excuse me.

They asked the District Court to injoin [sic] and restrain the defendants from executing him until they take certain measures to minimize the risk of unnecessary pain, suffering and mutilation during the execution process. That's the end of the quote. And we think that's exactly what they're asking for here. And the Court stated that that should be construed as a habeas petition and, therefore, is subject to the rules governing successive petitions. And because they didn't go to the Eleventh Circuit and get permission to file a second habeas petition, the District Court did not have jurisdiction to consider the complaint.

On the claim regarding the state statute, we [23] think that the court is prohibited from exercising jurisdiction by the Eleventh Amendment, and as construed in the Penhurst case. And can I go into that in the more detail now, or –

THE COURT: I'm aware of that.

MR. BILLINGSLEY: Okay. Well that's the basis for the state law claim.

THE COURT: I have a couple of questions for you, Mr. McIntyre. Will you be addressing this, Mr. McIntyre?

MR. McINTYRE: Yes, sir.

THE COURT: Okay. I have a couple of questions before we move into the merits of the dismissal motion.

Has Mr. Nelson exhausted all available habeas corpus relief, Mr. McIntyre?

MR. McINTYRE: Yes, I believe he has, Your Honor.

THE COURT: Okay. So he's been through the federal system and the state system at least once.

MR. McINTYRE: That's correct.

THE COURT: So in order for him to file another habeas petition, he would have to get permission from the Eleventh Circuit as a successive petition, is that correct?

[24] MR. McINTYRE: Yes. if this was a successive 2254, we would certainly have to get permission.

THE COURT: Okay. When was Mr. Nelson aware of the possibility that the cutdown procedure could be used?

MR. McINTYRE: Judge, I would say it was probably – and, Victoria, you can correct me if I'm wrong – but I would say it was probably sometime within the last thirty to forty days.

THE COURT: Why have you waited until now?

MR. McINTYRE: Well, I think what we have done, Judge, is when he expressed a concern about this it really didn't become ripe until he got to Holeman [sic]. And if you look at the attachments to our pleadings, we have done everything we could to try to assure him and assure us that this was going to be a procedure that the warden had under control, as he said, and it was going to be done as humanely as possible. And I think that as events transpired as of last week, the end of last week, we determined that it just seemed like the warden was making it up as he was going along.

And as I said before, a huge concern of Mr. Nelson's was that he thought the procedure was [25] going to be done twenty-four hours in advance and, therefore, it would be scrutinized. He had visitations scheduled for Thursday before his execution. He certainly didn't think the State of Alabama was going to butcher him and then send him out to the visitation room.

But all of a sudden out of nowhere the warden changed the rules on Friday. And this caused us terrible concern and Mr. Nelson terrible concern because now there will be no scrutiny of this procedure. And we won't know how many times they had to cut on him or where they had to cut on him.

I think that would be our main answer to that, Your Honor.

MR. McINTYRE: Judge, can I just say one other thing?

THE COURT: Yes.

MR. McINTYRE: I would like to think that the court looks at our pleadings and realizes how much time we have spent either talking with people in the Department of Corrections or Warden Culliver, I hope the Court will realize that what we have been trying to do is deal with a very unique situation under very difficult circumstances. And as I said before, I have never had a client with this issue. I don't think the [26] State of Alabama has ever had an inmate who was scheduled for execution with this issue.

And I'm not a doctor, and so, you know, this has been sort of a learning process for me in terms of understanding the procedures, understanding Mr. Nelson's condition, and we have been trying to handle this as responsibly as we could in representing Mr. Nelson's interests.

MR. BILLINGSLEY: Your Honor, I could just –

THE COURT: Just a minute, Mr. Billingsley, I'm not quite through with Mr. McIntyre yet. Just hold your point.

Mr. McIntyre, how am I going to get around – and I use "get around" with some seriousness – the Fugate and the Hill vs. Hopper cases?

MR. McINTYRE: Well, judge, I understand your concern in that regard, but I think this is truly, and I haven't had time to research this nationwide, but I think the difference between the cases that have been cited and our case is that we are not challenging how they plan to execute Mr. Nelson.

THE COURT: I don't understand how you are not challenging –

MR. McINTYRE: Well, judge, I think the only [27] realistic way to look at this is that in Mr. Nelson's unique situation there are truly two procedures that are required in order to execute him by lethal injection. The first – And I think the best evidence of that is that the warden originally was going to do the first medical procedural [sic] on Wednesday. I mean that is a separate surgical medical procedure that has to be conducted on people who have compromised veins.

So our position is there are two procedures that have to occur, and I think at least Warden Culliver has viewed this the same way. We are not challenging the legal [sic] injection. We are not challenging anything about the legal [sic] injection. We are challenging this procedure that allows them to gain venous access. And we're not saying that there are not any conditions under which they can get venous access. we're saying just the opposite.

There are ways to get it that don't violate the Eighth Amendment. But we believe, of course we don't have the [sic] their protocol, that their methods violate the Eighth Amendment. And if you look, Judge – And so the question is if you said is this just a 2254 in a 1983 closing [sic], or is this a true 1983. And I would say in this situation with these two distinct procedures, we're not challenging lethal injection, [28] we're not challenging the execution, we're challenging the separate medical procedure. And, Judge, if you look at –

THE COURT: How do you get around Fugate where the court says a complaint seeking to prohibit state officials from executing the plaintiff until they take measures to minimize the risk of unnecessary pain, suffering

and mutilation during the execution should be considered a habeas petition?

MR. McINTYRE: Well, Judge, I don't want you to think I'm splitting hairs, but I mean I don't think we're talking about the execution. We're talking about the procedure prior to the execution.

THE COURT: Okay. How can you separate this procedure from the execution? Without the execution, this procedure isn't necessary. Why isn't it a part of the execution procedure?

MR. McINTYRE: Well, I think it's certainly, Your Honor, a condition precedent of the lethal injection, but it's not one and the same. And if you look at the same line of cases, you know, Hill and Spivey – I mean Hill and Fugate, if you look at Spivey vs. State Board of Pardons and Paroles, which is also out of Georgia which is 279 F.3d 1310, they referred to "in determining whether a claim is [29] recognizable under 1983, a court must ask whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or his sentence." And that is simply not the case here.

THE COURT: But in those earlier cases I thought the issue was whether a judgment in favor of the plaintiff would stay the execution. And I thought that's exactly what you're asking here.

MR. McINTYRE: Judge, that is what we're asking for.

THE COURT: And because the manner of execution ultimately, you're saying, would violate the Eighth Amendment.

MR. McINTYRE: No, Your Honor. What I'm saying is the manner of execution in Mr. Nelson's case is lethal injection, and we are not challenging that in any way whatsoever. But what we are challenging is how the State of Alabama at the present time intends to to [sic] have venous access on Mr. Nelson.

THE COURT: What are the standards for getting a successive petition, filing a successive petition?

MR. McINTYRE: Judge, I think it's – well, let's see here. Judge, I think, and like I said don't hold me to this strictly, but I believe it's under 28 [30] U.S.C. 2244, and it deals with, you know, new rules of Constitutional law, factual predicates that couldn't have been discovered previously. I mean, Judge, obviously I'd like to get the state's pleading and see what they say and respond to it in writing, but –

THE COURT: Why couldn't arguably this fall under a factual predicate that wasn't discovered earlier?

MR. McINTYRE: Well, Judge, I think, and I don't now if you're looking at the statute –

THE COURT: I'm not.

Mr. McINTYRE: I believe – and like I said I don't want to talk myself out of a position here, but let me just address what you just said. Obviously, the factual predicate for this was not available to Mr. Nelson until very recently.

THE COURT: Right.

MR. McINTYRE: The problem is, I don't think that's the only part of the standard.

THE COURT: Okay. Do you ever [sic] the standard before you?

MR. McINTYRE: Yes.

THE COURT: Okay. What's the other part of the standard? If you know.

MR. McINTYRE: (b)(1), Judge, says, this is [31] the (b)(1), the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and then small two, the facts underlying the claim if proven and viewed with the evidence as a whole, be sufficient to established [sic] by clear and convincing evidence that but for the Constitution [sic] error no reasonable find [sic] finder would have found the applicant guilty of the underlying offense.

And obviously, Your Honor, I mean our claim does not have anything to do with factual innocence. But, judge –

THE COURT: Now is there anything else you wanted to add, Mr. McIntyre?

MR. McINTYRE: I just wanted to say, Judge, that I haven't found a case in the Eleventh Circuit on this issue that is similar to our case in terms of having a procedure prior to the execution, that if you successfully – if we are successful in our challenge, all it's going to do is to provide Mr. Nelson with a procedure prior to his execution that meets the Eighth Amendment. That's it. It's not going to stop his execution, and we're not asking ultimately for his execution to be stopped in this suit.

THE COURT: Okay. Let's address your state [32] law claim. Doesn't Penhurst pretty much foreclose that claim?

MR. McINTYRE: Judge, I would need to look at Penhurst.

THE COURT: Well Penhurst essentially says that federal courts cannot order state officials to comply with state law. You need to go to a state court to do that.

MR. McINTYRE: Judge, I think if that is what Penhurst says, if we had to, you know, we could dismiss that claim and rely sole [sic] on our federal claim.

THE COURT: Let me assure you that's exactly what it says.

MR. McINTYRE: Okay, I wasn't questions [sic] you.

THE COURT: And I don't think I can hear your state law claim. I think you need to be in state court on that. I can say that with confidences [sic].

MR. McINTYRE: Obviously, Judge, that is a very minor part of this suit.

THE COURT: Well whether it's a minor part or not, I cannot entertain it under a 1983 action. So if you want to pursue that claim, you need to file your claim in state court forthwith, I can summarily dismiss that since it's under the Eleventh Amendment.

But let's get back to the habeas issues. So [33] you're saying that under 2244, you can't challenge a last minute claim of cruel and unusual punishment in the manner of execution, assuming those facts did not arise until the last minute. That's your concern, Mr. McIntyre?

MR. McINTYRE: Judge, I'm sorry, would you say it one more time?

THE COURT: Is your concern that you might not be able to raise an Eighth Amendment claim to the manner of execution even if those facts that give rise to the claim did not arise until the last minute?

MR. McINTYRE: Yes.

THE COURT: As long as you were subject to a successive petition rule.

MR. McINTYRE: Yes.

THE COURT: Okay. I'll hear from the defendants now again, if they would like to add any further argument on their habeas question. I should say the motion to dismiss.

MR. BILLINGSLEY: I wanted to respond to your question about when the factual basis for the claim was known. If you look at Attachment 2 to the complaint, there's some correspondence from the counsel for Nelson which reflects that on August 19th they were aware not only of the possibility of a [34] cutdown procedure and the problems that may be caused by compromised veins, but they were also aware that the warden would not be willing to release information regarding the protocol or the medical personnel that would be present. So they were aware of those things on August 19th.

Just real briefly on the habeas versus 1983 question, I think Fugate again forecloses their claim. I mean this is exactly what they're asking for. The same thing that the court described there. And the Court in that case also went on to say that it wouldn't be acceptable as a habeas petition in other words, it wouldn't qualify for the exceptions to file a second successive habeas petition. So I don't think there is a question that it has to be one or the other. I

mean in that case it was neither. In this case it may be neither as well.

MR. CRENSHAW: Judge, also as further authority the Provenzano case decided by the Eleventh Circuit, 215 F.3d 233. Now that particular claim wasn't raised as a 1983 lawsuit, and it was raised as a habeas petition and the Eleventh Circuit didn't allow it because it didn't satisfy the provisions under 2244. But I think like Fugate and Provenzano, the facts of that case was dealing – or in Provenzano [35] rather, the facts of that case was dealing with the previous execution where, you know, one of the so-called cutdown procedures did occur. And, again, in Provenzano the Eleventh Circuit said – or they dismissed the lawsuit.

THE COURT: Is there any likelihood that you lawyers could get together and agree on a procedure that would be acceptable to both sides for the location of the vein?

MR. McINTYRE: I would certainly be open to that.

MR. CRENSHAW: Your Honor, I think we've outlined the protocol here. I don't know if Mr. McIntyre wants to suggest a different one, but –

THE COURT: Has he seen your affidavit yet from your doctor, or whomever is submitting the affidavit this be [sic] afternoon?

MR. CRENSHAW: Your Honor, no, sir, he has not. And if this affidavit is executed, we certainly have no problem in faxing him that affidavit immediately after we end this phone call.

THE COURT: Why don't you fax it to me, as well.

MR. CRENSHAW: Your Honor, we will certainly do that.

[36] THE COURT: Right. I'll let me [sic] law clerk give you the fax number after we finish.

MR. McINTYRE: Your Honor, Can I say one thing?

THE COURT: Yes.

MR. McINTYRE: I think your last question is sort of an indication of why this isn't merely a successive habeas, is because if we were trying to stop the execution, there isn't any way for me to sit down with Mr. Crenshaw and discuss anything. He wants to execute him, I don't want him to. That's not the case in this situation.

I mean, we are truly trying to get an honest assessment of Mr. Nelson's venous situation, and we just want to do what we can do so that the procedure before they lethally inject him so that that procedure is as humane as it can be under current medical procedures.

And, judge, lots of people out there in the free world have problems where they have vein problems and they need to have access to a vein, or for example, let's say cancer patients on chemotherapy, there are procedures out there that are done by people I'm sure, doctors every day, where that access is done just in the best way possible. And that's all we're [37] trying to do. We are not trying to stop it.

MR. CRENSHAW: Your Honor, one brief point for whatever this is worth. Some of what Mr. McIntyre is saying is confusing to me about sending a doctor in earlier than the execution, because I don't know if he's suggesting that if somebody actually do an IV stick several days before the execution to see if that will work. I mean even if a doctor evaluated Nelson at this point, and looked at his thigh say, for example, until you actually try to attach an IV to Mr. Nelson's body you don't know whether that's going to work or not.

So some of what Mr. McIntyre is saying is a little confusing. But of course as we will outline in the affidavit, we do set out the protocol that the doctor is going to administer.

THE COURT: And this affidavit is by Culliver?

MR. CRENSHAW: Yes, sir, it's based upon Culliver's two telephone conversations with this doctor.

THE COURT: Okay is this doctor going to be present at the procedure? I can't remember.

MR. CRENSHAW: Yes, sir, definitely. The doctor is the medical person who is going to be [38] attaching the direct line to Nelson.

THE COURT: Has this doctor reviewed Mr. Culliver's affidavit?

MR. CRENSHAW: No, sir, he's not.

THE COURT: Is the doctor available right now?

MR. CRENSHAW: Your Honor, I don't know the identity of this person. It's my understanding that Culliver

and the doctor are going to meet face-to-face today at the prison.

THE COURT: Okay. I'd like some verification before noon, either through Mr. Culliver or the doctor, that the doctor has verified everything in the affidavit.

MR. CRENSHAW: Yes, Your Honor. I will try to do that.

THE COURT: Okay.

MR. CRENSHAW: Your Honor, I believe the warden may be out-of-pocket until noon, but I'll try my best.

THE COURT: Okay. Anything else, counsel?

MS. SMITH: Your Honor, one thing that's very important, I think, from our side is that it doesn't – according to the expert that we've been consulting with, cutdown procedures and this kind of [39] venous access requires specialized training. And so to say there's going to be a doctor there, that's better than what we've gotten so far because basically Culliver has just said I'm not going to tell you if it's going to be a nurse, a doctor or whoever. So we're happy there's going to be a doctor there.

But we would also have concerns as to what training and credentials the doctor that is going to be in charge of this has. And we would also have some concerns about what medical apparatus and equipment would be available if, you know, GOD forbid, something goes wrong. Because, of course our expert has alerted us to many things that go wrong in a proper medical setting in a hospital. And so now we're not even in a hospital, we're in a prison. So I guess we would also have those concerns.

THE COURT: Right. Well, when will your motions be filed? You said within the next hour on the motion for venue and by noon on the motion to dismiss?

MR. CRENSHAW: Yes, Your Honor, on the motion for change of venue which is what I have been working on, you've added a few things which you need to know, so that may delay me. I think I had originally told you within the hour, but I need to [40] obtain the information that you've requested.

THE COURT: Okay. I'd like all your motions filed by no later than noon, because I'd like to get a ruling out by two this afternoon.

And the transcript of this proceeding will be made immediately after this conference call, and we can get that to the Eleventh Circuit right now. I believe our court clerk is faxing everything that you all filed with the Eleventh Circuit.

So if I can get a ruling by two o'clock, hopefully that can get to the Eleventh Circuit shortly after two o'clock.

I assume you all have given your fax numbers and phone numbers to the court personnel so you can be informed of my ruling at two o'clock?

MR. BILLINGSLEY: I have not, Your Honor.

THE COURT: Okay, I'm going to leave all of you on the line, and Ms. Carnes will get all of your fax numbers, telephone numbers, and you'll also get my fax number so that you all can be informed at two o'clock.

MR. McINTYRE: Judge, can I ask you one question?

THE COURT: Yes.

MR. McINTYRE: If we want to, can we file a [41] reply to their motions within whatever time you want to set for us?

THE COURT: Yes. If they're going to have them in by noon, you need to have something to me by one.

MR. McINTYRE: This is all central daylight time, right?

THE COURT: Yes, this is my time. And you can fax those directly to chambers.

Very good, stay on the line and Ms. Carnes will get all your numbers and so forth and give you my fax number.

MR. McINTYRE: Thank you, Your Honor.

THE COURT: Thank you.

* * *

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter as prepared by me to the best of my ability.

I further certify that I am not related to any of the parties hereto, nor their counsel, and I have no interest in the outcome of said cause.

Dated this 7th day of October 2003.

MITCHELL P. REISNER, CM, CRR, official US Dist. Court Reporter Registered Professional Reporter Certified Real-Time Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON,)
Plaintiff,)
v.) Civil Action No. _____
DONEL [sic] CAMPBELL, and GRANTT CULLIVER.)
Defendants.)

MOTION TO DISMISS

COMES NOW the defendants, by and through the Attorney General for the State of Alabama, and move this Court to dismiss Nelson's complaint, filed under 42 U.S.C. § 1983. More specifically, Nelson's complaint is due to be dismissed in accordance with Rule 12(b)(1) and (6), F.R.Civ.P. In support of this motion, the defendants submit the following:

PARTIES

The Plaintiff, David Larry Nelson, is currently incarcerated on Alabama's Death Row in Holman Prison, Atmore, Alabama, awaiting his execution, which is scheduled for 6:00 p.m. central time on October 9, 2003.

Plaintiff has named the following Defendants: a) Donal Campbell, Commissioner of the Alabama Department of Corrections, in his official capacity; and b) Grantt Culliver, Warden of William C. Holman Correctional Facility, in his official capacity.

INTRODUCTION

For more than twenty years, David Larry Nelson has been on Alabama's death row for the 1978 murder of Wilson W. Thompson. Nelson received his death sentence after being convicted of "murder committed by a defendant who has been previously convicted of murder in the first or second degree in the 20 years preceding the crime." Ala. Code § 13A-5-40(a)(10) (1975). Nelson exhausted all of his state and federal court appeals when the Supreme Court of the United States, on March 24, 2003, denied his petition for a writ of certiorari from the decision of the Eleventh Circuit Court of Appeals, affirming the dismissal of his habeas petition. *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002), cert. denied, 123 S. Ct. 1573 (2002).

On April 4, 2003, the State of Alabama moved the Alabama Supreme Court to set an execution date for Nelson. Shortly thereafter, counsel for the State received a letter from Nelson in which he represented that his attorneys would not respond to the motion nor "seek a stay of execution [on his] behalf." (See attached correspondence from Nelson) He additionally requested that any possible steps be taken to insure that an execution date was set expeditiously. (Id.) On September 3, 2003, the Alabama Supreme Court set Nelson's execution for October 9, 2003.

More than two weeks before the issuance of the death warrant, counsel for Nelson expressed concerns to Warden Culliver "about the lethal injection procedure due to the fact that he [Nelson] has severely compromised veins." ("Attachment 2" to Nelson's complaint). Additionally expressed by counsel was an understanding that Warden Culliver would not provide a "written protocol regarding execution procedures" or any information regarding the

personnel who would be carrying out the execution. (Id.) Thus, despite being aware of the basis for the current claim more than two weeks before an execution date was even set, Nelson waited until three days before his scheduled execution to file his complaint.

This Court does not have subject matter jurisdiction over either of Nelson's claims. First, Nelson's claim challenging the constitutionality of the manner in which his execution is to be carried out is the "functional equivalent" of a second habeas petition and, therefore, is "subject to the law applicable to successive habeas petitions." *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997). This Court "lack[s] jurisdiction to consider [Nelson's] request for relief because [Nelson] ha[s] not applied to [the Court of Appeals] for permission to file a second habeas petition." *Id.*

Second, the Eleventh Amendment to the United States Constitution prohibits this Court from exercising jurisdiction over Nelson's "state law claim." Nelson seeks relief on the basis that Warden Culliver, a state official, has failed to comply with Section 15-18-81 of the Code of Alabama (1975). (See Nelson's complaint at p. 18) The Supreme Court for the United States has, however, unequivocally held that the Eleventh Amendment bars a federal court from instructing state officials on how to follow state law. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (stating that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law" and holding that

"[s]uch a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment").[1]

Because this Court is prohibited from exercising jurisdiction of Nelson's complaint, dismissal is required under Rule 12(b)(1) of the Federal Rules of Civil Procedure. For this reason, and those that follow, the defendants respectfully request that this Court grant this motion to dismiss.

ARGUMENT

I. This Court Does Not Have Jurisdiction to Consider Nelson's Claim that Alabama's Method of Execution Will Deprive Him of His Rights Guaranteed by the Eighth Amendment.

Nelson's complaint, purportedly brought pursuant to 42 U.S.C. § 1983, seeks to obtain relief from this Court "enjoin[ing] and restrain[ing] the defendants from executing him until they take certain measure to minimize the risk of unnecessary pain, suffering and mutilation during the execution process." *Fugate v. Department of Corrections*, 301 F.3d 1287, 1288 (11th Cir. 2002). Because this complaint "constitutes the functional equivalent of a second habeas petition, . . . [this] court lack[s] jurisdiction to consider [Nelson]'s claim because he ha[s] not applied . . . for permission ot [sic] file a successive application." *Id.* at 1288 (internal citations and quotation marks omitted),

[1] This claim was summarily dismissed by the Court during the telephone conference held on the morning of October 7, 2003. It is, therefore, not addressed any further in this motion.

citing 28 U.S.C. 2244(b)(3)(A). Nelson's complaint must, therefore, be dismissed.

In *Felker v. Trupin* [sic], 101 F.3d 95 (11th Cir. 1996), the Eleventh Circuit Court of Appeals held that a prisoner may not circumvent the rules regarding second or successive habeas petitions by filing a § 1983 claim. Like Nelson's challenge to the method of execution to be employed in carrying out his sentence, the plaintiffs, in *Felker*, challenged the constitutionality of Georgia's method of execution on Eighth Amendment grounds. *Id.* at 96.[2] The Court, "[g]uided by *Gomez v. United States District Court*, 503 U.S. 653 (1992), as interpreted by *Lonchar v. Thomas*, 517 U.S. 314 (1996), . . . conclude[d] that [the] § 1983 claim [was] subject to the procedural requirements for bringing a second or successive habeas claim." *Id.* On that basis, the Court determined that "the district court was without authority to consider [the] request for relief." *Id.*; see also *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997) ("As Hill's § 1983 cruel and unusual punishment claim constitutes the 'functional equivalent' of a second habeas petition, the district court was subject to the law applicable to successive habeas petitions."), citing *Felker*, 101 F.3d at 96.

[2] Contrary to Nelson's representations, he is challenging Alabama's method of execution. Admittedly, his status as an intravenous drug user may require the State to employ additionally [sic] procedures than those that would otherwise be required. (See attached affidavit of Warden Culliver) Those procedures are, however, part of the method of execution. Nelson's challenge to their potential use, therefore, is a challenge to the execution itself. His claim is, moreover, indistinguishable from that considered in *Fugate*.

Other circuits have resolved this issue in a manner consistent with the opinions above. For example, in *Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997), the Eighth Circuit Court of Appeals consider [sic] a complaint, brought under § 1983, "challenging the constitutionality of death by electrocution in general and, more specifically, the constitutionality of the particular method by which Nebraska allegedly administers the electrical current for electrocutions." The claim was rejected on the basis that "the district court correctly determined that Williams' current complaint is the functional equivalent of a successive habeas action, regardless of its technical label." *Id.* at 336.

Additionally, in *McQueen v. Patton (In re Sapp)*, 118 F.3d 460 (6th Cir. 1997), the Sixth Circuit Court of Appeals rejected a § 1983 "claim[ ] that Kentucky's use of electrocution to carry out a death sentence constitutes cruel and unusual punishment." The Court noted that "[a]lthough McQueen claims that he is not challenging the constitutionality of the death penalty itself but only 'a condition of confinement,' we believe that this challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus." *Id.* at 462. The Court "follow[ed] the clear holding of *Gomez*, as endorsed by the Eleventh Circuit, that a challenge to the method of execution, whatever denominated . . . is to be treated as a habeas petition." *Id.* at 464.

Based upon the foregoing authorities, Nelson's complaint must be treated as the "functional equivalent" [sic] a second habeas petition. "Because [Nelson] failed to apply for permission to file a second habeas petition as required

by 28 U.S.C. § 2244(b)(3)(A), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, tit. I (1996), [this Court is] without authority to consider their request for relief." *Felker*, 101 F.3d at 96.

Finally, based on the decision of the United States Supreme Court in *Gomez v. United States District Court*, 503 U.S. 653 (1992), Nelson's complaint is due to be dismissed regardless of "[w]hether his claim is framed as a habeas petition or as a § 1983 action." *Id.* at 654. In either case, Nelson seeks an "equitable remedy" and

> Equity must take into consideration the State's strong interest in proceeding with its judgment and [the petitioner's] obvious attempt at manipulation. This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Id. at 654; see also *Lonchar v. Thomas* 517 U.S. 884 (1996) (explaining *Gomez* as holding that the habeas rules do apply to a last minute § 1983 method of execution claim).

II. Alternatively, Nelson's Claim Should be Dismissed For Failure to State A Claim Upon Which Relief Can be Granted.

Alternatively, Nelson has failed to state a claim upon which relief may be granted. His complaint is based primarily, if not entirely, on the assumption that the State will be employing a "barbaric cut-down medial [sic] procedure." (Nelson's complaint at p. 14) The affidavits submitted

along with this motion to dismiss, however, demonstrate that such is not the case. Instead, a physician will be present and responsible for connecting a direct intravenous line to Nelson. (Affidavit of Warden Culliver) He will first attempt to connect the IV to the femoral vein located in the thigh and if, for some reason, this is unsuccessful, he will attach a direct intravenous line to the external carotid vein located in the neck. (Id.) The doctor has successfully used these procedures for locating a vein hundreds of times in the past. (Id.) Additionally, according to the attached affidavit of Dr. Marc Sonnier, these particular procedures have a high rate of success and cause minimal pain to the affected individual. (Attached affidavit of Dr. Marc Sonnier) Should a "cut-down" become necessary, moreover, Dr. Sonnier, who has employed such a procedure 8-10 times in the past, provides a description and states that any pain would be minimal due to the use of a local anesthetic

Finally, summary dismissal is appropriate here because plaintiff has failed to provide evidence that the defendants are "deliberately indifferent" to the risks associated with carrying out a death sentence by lethal injection, even under these circumstances. See *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that an Eighth Amendment violation occurs only [sic] the deprivation alleged is, objectively, "sufficiently serious" and the official acts with "deliberate indifference" to inmate health or safety).

CONCLUSION

For the foregoing reasons, this Court is due to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the *Federal Rules of Civil Procedure*.

Respectfully submitted,

Bill Pryor
Alabama Attorney General

BY –

/s/ J. Clayton Crenshaw
J. Clayton Crenshaw
Assistant Attorney General

/s/ Michael B. Billingsley
Michael B. Billingsley
Deputy Solicitor General

[Certificate Of Service Omitted In Printing]

Date: 5-20-03

Re: Motion To Set Execution Date:

Dear Mr. Billingsley:

I am writing this letter in regards to your, Motion To Set An Execution Date, which you filed with the Alabama Supreme Court on April 4th 2003.

Pursuant to reviewing the motion. I feel it is only fair that I bring to your attention that you have misstated the

facts of the case and printed several untruths throughout your motion.

However I would like to inform you through this letter that I have no plans to contest your motion filed with the court. Nor will my attorneys of record be responding to your motion in my behalf, or seek a stay of execution in my behalf.

Mr. Billingsley, I would like to further inform you that I fully agree with you on one truth stated in your motion. I have been incarcerated and housed on death row for more than 25 years, pursuing various appeals in the judicial system. So I conclude and agree with you that an execution date should be set promptly by the court in the immediate future.

Furthermore sir, if there are any further steps you can take to insure that an execution date be set in an expedious [sic] manner, I would be grateful if you would pursue those avenues in my case at your earliest convenience.

Respectfully Submitted:

/s/ David L. Nelson
David Larry Nelson
Z-383, 5-77
100 – Warrior Lane
Bessemer, Alabama
85023-7299

cc. Attorneys

Michael K. McIntyre
H.Victoria Smith
Clerk,
Alabama Supreme Court

DAVID LARRY NELSON,)
Plaintiff,)
v.) Case No. _____
STATE OF ALABAMA,)
Defendant.)

AFFIDAVIT OF DR. MARC SONNIER

I, Marc Sonnier, do solemnly swear to the following facts:

1. I am a medical doctor employed by Naphcare, a company currently under contract to provide health care for the State of Alabama prison system. I received a Bachelor of Science degree in biology from the University of South Alabama in 1975 and a medical degree, also from the University of South Alabama, in 1981. I have worked in my current position for more than a year. I have been asked to describe and comment on several procedures medical personnel can undertake to locate a vein, for the purposes of drawing blood or setting up an IV line, from an individual who has compromised veins due to extensive intravenous drug use.

2. It is my understanding that the first procedure to be attempted will be to locate and attach the IV to the femoral vein located in the upper thigh. This is a routine procedure that I have conducted approximately 80 to 100 times in the past for the purpose of drawing blood from an individual with no superficial veins. Based on my knowledge, experience, and observations of the patients during the procedure, it is my opinion that it causes minimal pain similar to that experienced from a needle stick in the arm. In all the times I have conducted the procedure, I have been

unable to successfully locate the vein approximately 8 to 10 times. In each of those instances, however, the failure can be attributed to the fact that the patient was obese.

3. I have been told that the second procedure to be attempted is to attach the intravenous line to the external carotid vein located in the neck. I have done this procedure 8-10 times. The external carotid vein provides access to an IV line and is actually a bigger caliper vessel than the ones in the lower arms and hands. The pain involved with this procedure would be no worse than if someone were attaching an IV to the wrist or arm.

4. It is my understanding that the next procedure to be attempted, if necessary is to perform a "cut-down" procedure by making a two inch incision in the antecubital fossa located in the front part of the arm in the bend of the elbow. The procedure involved here is to isolate and dissect the saphenous vein that is relatively easily accessible just beneath the skin. This is a procedure that I have employed 8-10 times. The procedure itself is painless because a local anesthetic is used.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2003, in, Alabama.

/s/ Marc Sonnier MD
Marc Sonnier

Sworn and subscribed before me this the 7 day of ~~September~~ October 2003.

/s/ [Illegible]
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, v. DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, GRANTT CULLIVER, Warden of Holman Correctional Facility.	)	Case No. ___

AFFIDAVIT OF WARDEN GRANTT CULLIVER

I, Grantt Culliver, do solemnly swear to the following facts:

1. I am presently employed with the Alabama Department of Corrections as Warden of the Holman Correctional Facility. I have been employed in that capacity since August 2002. Before I became Warden at Holman, I was Warden at Fountain Correctional Facility.

2. Seven to ten days before receiving the execution warrant on September 3, 2003, I spoke on the telephone with Victoria Smith, who told me she was David Nelson's' legal counsel. Ms. Smith said that Nelson's vein structure was poor in his lower arms and hands due to intravenous drug use. Ms. Smith brought up the possibility of whether Nelson could be electrocuted because she believed it would be difficult to find a vein for the purpose of carrying out the execution by lethal injection. I told Ms. Smith that

according to state law it was too late for Nelson to select the option of being electrocuted.

2. Because these concerns were expressed to me, I had a registered nurse examine Nelson around September 10 to see whether a vein could be found on his lower arms and hands to administer the lethal injection. The nurse reported to me that Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line.

3. Approximately three weeks ago, a second nurse examined Nelson in my presence. Nelson knew this nurse from Donaldson and reminded her that the medical personnel at the Donaldson Correctional Facility were unable to draw blood from Nelson's lower arms and hands because of his intravenous drug use. Nelson raised his pants leg to remind her of the location where the medical personnel took blood from him.

4. Because of the above-described facts, I have recently been in contact with a physician who resides in Alabama who has agreed to perform any procedures necessary to connect a direct intravenous line. The doctor has told me that he will first attempt to connect a direct intravenous line to the femoral vein located in the thigh. If this procedure is unsuccessful, the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck. The doctor told me that he has performed these procedures hundreds of times. The last procedure that the doctor will attempt, should it become necessary, will be to make a 2 inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The doctor told me that

this last procedure involves the administration of a local anesthetic.

5. Neither Nelson nor his lawyers have ever requested that a physician be admitted into Holman to perform an examination of Nelson.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 6, 2003, in Montgomery, Alabama.

/s/ Grantt Culliver
Grantt Culliver

Sworn and subscribed before me this the 6th day of Ocotber [sic], 2003.

/s/ Marie F. Newman
Notary Public

Notary Public, AL State at Large
My commission expires 10/16/04

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, vs. DONAL CAMPBELL, In his individual and official capacity as Commissioner of the Alabama Department of Corrections and GRANTT CULLIVER, In his individual and official capacity as Warden of William C. Holman Correctional Facility, Defendants.	)	Civil Action File No. 03-T1008-N

REPLY TO DEFENDANTS' MOTION TO DISMISS

Now Comes Plaintiff David Larry Nelson by and through undersigned counsel who submits his response to the Defendants' Motion to Dismiss.

The Defendants in their Motion to Dismiss rely upon the Affidavit of Warden Grantt Culliver and the Affidavit of Dr. Marc Sonnier.

Dr. Mark Heath, a Board Certified anesthesiologist who submitted an Affidavit that was attached to the Plaintiff's Complaint for Injunctive and Declaratory Relief as Attachment 6 and that outlined specific dangers associated with the procedure the Defendants represented to the Plaintiff and counsel for the Plaintiff that the Defendants intended to perform on the Plaintiff, has reviewed those

Affidavits. Dr. Heath's response to the two affidavits submitted by the Defendants is contained in another Affidavit attached hereto.

Of significant importance is the fact that the physician consulted as an expert by the Defendants intends to attach an intravenous line to the "external carotid vein". (See Paragraph 3 of Dr. Marc Sonnier's Affidavit). As Dr. Heath points out, **"The 'external carotid vein' does not exist in human beings"**. (See Paragraph 5 of Dr. Mark Heath's Affidavit, attached hereto). Additionally, Dr. Ernest April, who is an Associate Professor of Anatomy at Columbia University and Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (See Paragraph 7 of Dr. Mark Heath's Affidavit, attached hereto).

It is respectfully submitted that this fact alone supports the Plaintiff's contentions and concerns and should convince this Court to deny the Defendants' Motion to Dismiss.

WHEREFORE it is respectfully [sic] that this Court deny the Defendants' Motion to Dismiss and grant the relief requested by the Plaintiff in his Complaint.

Respectfully submitted,

/s/ Joe W. Morgan III by
by M.K.M. w/express permission

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[Certificate Of Service Omitted In Printing]

AFFIDAVIT OF MARK HEATH, M.D.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

My name is Mark Heath, M.D., and I have previously submitted an Affidavit regarding Mr. David Nelson's execution.

1.

I have reviewed two affidavits faxed to me at 2:19 PM Eastern Time on October 7, 2003 by Mr. Nelson's attorneys.

2.

The affidavit of Grantt Culliver quotes a registered nurse's finding that David Nelson does "not have any veins in his lower arms and hands sufficient to support a direct intravenous line".

3.

Based on David Nelson's history of intravenous drug abuse (IVDA) and the established lack of visible peripheral veins, it is highly likely that the personnel staffing his execution will be required to place a central line in either the femoral vein (in the groin), the subclavian vein (behind the clavicle or collar bone), or in one of the jugular veins (in the neck) – in internal or external jugular vein.

4.

The affidavit of Grantt Culliver states that "the doctor will attempt to attach a direct intravenous line to the external carotid vein located in the neck".

5.

The "external carotid vein" does not exist in human beings.

6.

The term "external carotid vein" is not listed in Stedman's Medical Dictionary and it is not listed in Dorland's Medical Dictionary.

7.

Dr. Ernest April, Associate Professor of Anatomy at Columbia University in New York City and Course Director of the Gross Anatomy Course at the Columbia College of Physicians and Surgeons, has never heard of the term "external carotid vein." (Personal Communication at 2:45 P.M.).

8.

It can be speculated that Mr. Culliver intended to refer to the "external jugular vein", a commonly-used structure for obtaining intravenous access if peripheral access can not be secured.

9.

I note that Mr. Culliver's affidavit preceded the Affidavit of Dr. Marc Sonnier by one day.

10.

Dr. Sonnier in his affidavit states that he has been instructed that, if necessary, he should place a catheter in the "external carotid vein" of Mr. Nelson for the purpose of performing lethal injection. Dr. Sonnier uses the term "external carotid vein" twice in the same paragraph, and states that he has employed this procedure "8-10 times" (in his 22 years since graduating from medical school).

11.

Dr. Sonnier's repeated use of the term "external carotid vein", combined with his recitation of his "understanding" of the order of procedures to be attempted, raises in my mind the concern that he lacks currency and proficiency with the advanced techniques of intravenous access that almost certainly will be necessary for the conduct of Mr. Nelson's execution.

12.

The use of the term "external carotid vein" by both Mr. Culliver and Dr. Sonnier can not be coincidental. It raises in my mind the concern that Dr. Sonnier is acting under instruction from Mr. Culliver, and that these instructions include specification of technical medical issues that are likely to beyond the professional training and credentialing of Mr. Culliver.

13.

A further concern is that Dr. Sonnier states that he might perform a cut-down procedure on David Nelson's arm. It is highly likely that, due to Mr. Nelson's history of intravenous drug abuse, the deep and superficial veins of his arm will be scarred and/or thrombosed (occluded by clot), thereby rendering a cut-down procedure in the arm ineffective. Surgical exploration of Mr. Nelson's arm is likely to be technically challenging and painful. Dr. Sonnier's stated experience with cut-downs is "8-10 times" over the entirety of his medical career. It needs to be determined whether Dr. Sonnier has been credentialed by his employer, Naphcare, or by any hospital in Alabama, to perform this surgical procedure. A prior experience of "8-10 times" is not sufficient for contemplating surgical exploration of the arm of an intravenous drug abuser with known compromise of subcutaneous veins.

14.

It is difficult for me to understand why the State of Alabama would not want to recruit a well-trained, highly proficient, currently credentialed surgeon to supervise and/or perform the procedures required for establishing intravenous access. This level of expertise is clearly warranted by the recognized condition of Mr. Nelson's peripheral veins.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Mark Heath, M.D.
MARK HEATH, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON, Plaintiff, vs. DONAL CAMPBELL, In his individual and official capacity as Commissioner of the Alabama Department of Corrections and GRANTT CULLIVER, In his individual and official capacity as Warden of William C. Holman Correctional Facility, Defendants.	)	**DEATH PENALTY** Civil Action File No. 03-T1008-N

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

(Filed Oct. 7, 2003)

Now Comes Plaintiff David Larry Nelson by and through undersigned counsel and, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure who amends his original Complaint in the above-styled matter as follows:

Plaintiff hereby incorporates by reference Paragraphs 1 through 87 of his original Complaint and amends said Complaint as set forth below.

88. The Defendants through their actions are treating the Plaintiff with "deliberate indifference". *See Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).

89. The Defendants' "deliberate indifference" to the Plaintiff's serious medical needs violates the Eighth Amendment's prohibitions against cruel and unusual punishments and creates a risk of "unnecessary and wanton infliction of pain". *See Estelle v. Gamble*, 429 U.S. 97 (1976).

The Prayer for Relief remains the same as in the original Complaint.

[signatures on next page]

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[Certificate Of Service Omitted In Printing]

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286 F.Supp.2d 1321

United States District Court,
M.D. Alabama,
Northern Division.

David Larry NELSON, Plaintiff,
v.
Donal CAMPBELL and Grantt Culliver, Defendants.

No. CIV.A. 03T1008N.

Oct. 7, 2003.

Joe Wilson Morgan, III, Birmingham, Michael Kennedy McIntyre, H. Victoria Smith, Atlanta, GA, for David Larry Nelson, plaintiff.

J. Clayton Crenshaw, Michael B. Billingsley, Office of the Attorney General, Montgomery, for Donal Campbell, in his individual and official capacity as Commissioner of the Alabama Department of Corrections, Grantt Culliver, defendants.

OPINION

MYRON H. THOMPSON, District Judge.

Plaintiff David Larry Nelson, an inmate at Holman Correctional Facility in Atmore, Alabama, is scheduled to be executed by lethal injection at 6:00 p.m. on October 9, 2003, for the murder of Wilson Thompson. On October 6, 2003, Nelson filed a complaint under 42 U.S.C.A. § 1983 against defendant Donal Campbell, the Commissioner of the Alabama Department of Corrections, and defendant Grantt Culliver, the Warden of Holman, alleging that a medical procedure that will be carried out prior to his execution will constitute cruel and unusual punishment, as proscribed by the Eighth Amendment to the United

States Constitution. Specifically, Nelson alleges that he has compromised veins because of his years of intravenous drug use and that the procedure the defendants have proposed for accessing a vein to administer the lethal injection is "invasive and barbaric" and may subject him to a "substantial risk of . . . substantial and prolonged pain."[1] Nelson seeks an order staying his execution, an order directing the defendants to provide him with "the protocol concerning the medical procedure which will be followed to gain venous access as a predicate to [his] execution," an order requiring the defendants to "consult with medical experts and promulgate a protocol concerning venous access that comports with contemporary standards of medical care and the Eighth Amendment," and an order compelling the defendants to comply with state law on death row prisoners' right of access to their physicians.[2] The defendants have filed a motion to dismiss for lack of jurisdiction.

I. BACKGROUND

In order to understand the relief Nelson is requesting, it is necessary to summarize briefly the procedure the State has proposed using.

Nelson's veins have been severely compromised due to years of intravenous drug use. He alleges that, over the last two decades, prison medical personnel have encountered difficulty gaining venous access during routine

[1] Complaint for injunctive and declaratory relief, filed October 6, 2003 (Doc. No. 1), pp. 9, 12.

[2] *Id.* at 19.

physical examinations.[3] Therefore, some alternative method besides a simple catheter in his arm will be necessary to gain access to his veins. Nelson brings this suit challenging the protocol the State has proposed using in order to gain intravenous access to his veins to administer the lethal injection.

Warden Culliver has presented an affidavit, confirmed by the doctor who will conduct the procedure, which states that, to administer the lethal injection, the doctor will attempt to attach a direct intravenous line to the femoral vein in Nelson's thigh, or, if that does not work, to the "external carotid vein" in Nelson's neck. In the event these are both unsuccessful, the defendants propose making a "2 inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure"[4]; this procedure, which is referred to as a "cut-down procedure," would be done using a local anesthetic.

Nelson has submitted expert testimony from Dr. Mark Heath stating, first, that the "external carotid vein" referred to by both Warden Culliver and Dr. Marc Sonnier, the defendants' expert, does not exist in human beings.[5] Dr. Heath further states that because of Nelson's history of intravenous drug use and the lack of visible peripheral

[3] Complaint for injunctive and declaratory relief, filed Oct. 6, 2003 (Doc. No. 1), p. 3.

[4] Affidavit of Warden Grantt Culliver, Attachment to Motion to dismiss, filed Oct. 7.2003 (Doc. No. 4), p. 3.

[5] Second affidavit of Mark Heath, M.D., Attachment to Reply to defendants' motion to dismiss, filed October 7, 2003 (Doc. No. 11), ¶ 5, 6, 7. Dr. Heath speculates that Warden Culliver may have intended to refer to the "external jugular vein."

veins in his lower arms and hands, medical personnel will probably have to place a central line in the femoral vein, which he states is in the groin, not the thigh; the subclavian vein behind the collar bone; or the jugular vein in the neck.[6]

Dr. Heath states that a cut-down procedure, which defendants intend to perform under local anesthetic, is "usually performed under deep sedation . . . because it would otherwise be an extraordinarily disturbing and distressing experience."[7] The procedure "involves making a series of surgical incisions through the skin, . . . underlying connective tissue, . . . layers of fat, [and] . . . layers of muscle, until the region surrounding a large vein is reached."[8] Such a procedure entails numerous risks (such as severe hemorrhage, extreme pain, cardiac arrest and asphyxia), and therefore should only be performed by a specialist.[9] Dr. Heath states that an attempt to perform a cut-down procedure on Nelson's arm will likely be "ineffective" because Nelson's veins will likely be "scarred and/or thrombosed (occluded by clot)" due to his history of intravenous drug use.[10]

According to Nelson, using a cut-down procedure is contrary to modern medical practice, and there is a less invasive, less painful, and safer alternative, referred to as

[6] *Id.* at ¶ 3.

[7] First affidavit of Mark Heath, M.D., Attachment 6 to Complaint for injunctive and declaratory relief, filed Oct. 6, 2003 (Doc. No. 1), ¶¶ 14, 13.

[8] *Id.* at ¶ 9.

[9] *Id.* at ¶ 18.

[10] Second Affidavit of Mark Heath, M.D., at ¶ 13.

"percutanous central line placement."[11] The defendants have offered no explanation as to why they intend to use a cut-down procedure instead of a percutaneous central line placement. Nelson requests that his execution be stayed long enough for this court to consider the merits of his claim that the use of a cut-down procedure constitutes cruel and unusual punishment under the Eighth Amendment.

II. STATE CLAIM

Nelson seeks an order requiring the defendants to abide by 1975 Ala.Code § 15-18-81, which provides that a condemned person's physician "shall be admitted to see him when necessary to his health." The defendants have moved to dismiss this claim on the grounds that this court does not have jurisdiction to order state officials to comply with state law. The court agrees that it is barred by *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984), from granting relief on Nelson's state-law claim. Accordingly, Nelson's state-law claim will be dismissed.

III. FEDERAL CLAIM

Nelson claims that the procedure by which the defendants plan to access his veins to administer the lethal injection – the so-called "cut down" procedure – will constitute cruel and unusual punishment under the Eighth Amendment. Nelson seeks an order staying his

[11] First affidavit of Mark Heath, M.D., at ¶ 23.

execution, requiring the defendants to divulge the exact protocol they intend to follow, and directing the defendants to develop a protocol that comports with contemporary medical standards. The defendants have moved to dismiss Nelson's federal claim on the ground that, while brought under 42 U.S.C.A. § 1983, it is the equivalent of a habeas corpus claim and, as a result, this court is barred from hearing the claim by 28 U.S.C.A. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132 (AEDPA). The court agrees that, under binding Eleventh Circuit Court of Appeals case law, this claim is due to be dismissed for lack of jurisdiction.

The Eleventh Circuit has held that when a prisoner brings an action under § 1983 that is the "functional equivalent" of a habeas corpus petition, the § 1983 action is to be treated as a habeas corpus petition and subjected to the limits imposed on successive petitions in 28 U.S.C.A. § 2244. *Fugate v. Dep't of Corr.*, 301 F.3d 1287, 1288 (11th Cir.2003); *Spivey v. State Bd. of Pardons and Paroles*, 279 F.3d 1301, 1303 (11th Cir.2002); *Hill v. Hopper*, 112 F.3d 1088, 1088-89 (11th Cir.1997); *Felker v. Turpin*, 101 F.3d 95, 96 (11th Cir.1996). The Eleventh Circuit has applied this rule on a number of occasions to § 1983 claims alleging that a particular manner of execution violates the Eighth Amendment. *See, e.g., Fugate*, 301 F.3d at 1288, *Hill*, 112 F.3d at 1088. The Eleventh Circuit has also strongly suggested that any § 1983 claim that seeks a stay of execution should be treated as a habeas claim. *See Spivey*, 279 F.3d at 1303 n. 3; *cf. Bradley v. Pryor*, 305 F.3d 1287, 1292 (11th Cir.2002) (Edmondson, C.J., specially concurring) (noting that an important reason the § 1983 claim before the court did not need to be treated as a habeas petition was that the petitioner did not seek a stay of execution). Constrained as it is by the

Eleventh Circuit's precedent, the court must conclude that Nelson's claim – which challenges procedures closely related to his execution and seeks a stay of execution – must be treated as a habeas petition.

As Nelson's counsel conceded in a telephone conference on October 7, 2003,[12] Nelson has already exhausted his habeas relief in this matter. *See Nelson v. Alabama*, 292 F.3d 1291 (11th Cir.2002), *cert. denied*, ___ U.S. ___, 123 S.Ct. 1573, 155 L.Ed.2d 319 (2003); *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir.1993). Under 28 U.S.C.A. § 2244(b), a prisoner is presumptively barred from bringing successive habeas petitions except in limited circumstances.[13] Further, 28 U.S.C.A. § 2244(b)(3)(A) requires that a prisoner wishing to bring a second habeas petition

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[12] Transcript of In-Chambers Telephone Conference, October 7, 2003, p. 22.

[13] 28 U.S.C.A. § 2244(b) reads in part:

"(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

must obtain approval from the court of appeals to do so.[14] Because Nelson did not first apply to the court of appeals for approval to file a second habeas petition, this court does not have jurisdiction to hear his claim. *Fugate,* 301 F.3d at 1288; *Spivey,* 279 F.3d at 1303. Accordingly, Nelson's Eighth Amendment claim must be dismissed.

IV. CONCLUSION

The court recognizes that the import of the dismissal of this lawsuit is that Nelson will be effectively left without a federal forum for review of his Eighth Amendment claim.

Nelson is not asking the court to permanently stop his execution;[15] instead, he is asking that his lethal injection be delayed until he is assured that a safe, medically

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[14] 28 U.S.C.A. § 2244(b)(3)(A) reads:

> "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

[15] This fact – that Nelson is not seeking a *permanent* stay of his execution – makes this case arguably factually different from *Fugate v. Dept. of Corrections,* 301 F.3d 1287 (11th Cir.2002), *Hill v. Hopper,* 112 F.3d 1088 (11th Cir.1997), and *Felker v. Turpin,* 101 F.3d 95 (11th Cir.1996). In all of these cases, death row inmates brought § 1983 actions seeking stays of execution on the ground that the method of their execution violated the Eighth Amendment. Here, Nelson does not challenge the lethal injection itself, but a unique procedure that must be carried out on him alone in order to gain access to his compromised veins so that the lethal injection can occur. This factual difference, however, does not detract from the conclusion that Nelson is still seeking a stay, albeit a temporary one, of his execution, and it is this stay request that brings this case within the restrictions of habeas relief as applied by the Eleventh Circuit.

acceptable procedure will be used to gain access to his veins. Nelson claims the State of Alabama is planning to perform an allegedly barbaric and dangerous medical procedure on him even though there is a safer alternative available. In other words, Nelson is asking the State to comply with the Eighth Amendment to the Constitution by refraining from inflicting unnecessary and wanton pain upon him. *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976).

Nelson did not know about the State's plan to use a "cut-down" procedure until earlier this year, so he could not have raised the issue in the federal habeas action he filed in 1997. Nonetheless, he almost certainly cannot obtain relief now by filing another habeas petition because his claim does not depend on a new constitutional principle or on newly discovered facts that show actual innocence. *See* 28 U.S.C.A. § 2244(b)(2)(A) & (B). Nor, for the reasons given in Part III of this opinion, can Nelson obtain non-habeas relief.

The rule that a § 1983 action seeking a stay of execution must be treated as a habeas petition means that, after a death row inmate has filed his first federal habeas petition, he can never obtain a stay of execution from a federal court so that court can review a claim of an Eighth Amendment claim regarding any later decision as to how the execution is to be carried out. The rule means that no matter how meritorious Nelson's claim is, and despite the fact that he could not raise his claim in his earlier habeas petition, there seems to be no way for him to obtain federal relief now.

This rule also distinguishes between death row inmates whose execution dates are imminent and those

whose are not. In *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir.2002), the Eleventh Circuit allowed a death row inmate's § 1983 action, which did not include a request for a stay of execution, to proceed because a judgment in favor of the plaintiff would not "necessarily imply the invalidity of his conviction or sentence," *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). There, the plaintiff sought access to evidence for the purposes of DNA testing, and the court noted that a judgment in his favor would merely give him access to the evidence, without implying anything about the validity of his sentence.

Likewise, here a judgment for Nelson would not imply anything about the validity of his conviction or sentence, but would simply compel the State to use a humane procedure to gain access to Nelson's veins for the purpose of administering a lethal injection. The only distinction between this § 1983 claim and the one in *Bradley* is that Nelson is scheduled to be executed in two days, with the procedure to be carried out before the execution, and thus a stay of execution is necessary for his case to be heard at all. However, Eleventh Circuit law is clear that such a stay can be obtained through only habeas relief – relief which is now foreclosed.

It would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment rights. However, as the law now stands, that is, absent a change by either the Eleventh Circuit or the United States Supreme Court, no such relief seems to be available.

An appropriate judgment will be entered.

JUDGMENT

In accordance with the memorandum opinion entered this date, the following is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The motion to dismiss, filed by defendants Donal Campbell and Grantt Culliver, on October 7, 2003 (Doc. No. 4), is granted.

(2) Plaintiff David Larry Nelson's complaint, filed on October 6, 2003 (Doc. No. 1), as amended on October 7, 2003 (Doc. No. 10), is dismissed without prejudice.

It is further ORDERED that costs are taxed against plaintiff Nelson, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

DAVID LARRY NELSON, Plaintiff, v. DONAL CAMPBELL and GRANTT CULLIVER, Defendants.	)	CIV. ACTION NO. 03-T-1008-N **DEATH PENALTY**

JUDGMENT

(Filed Oct. 7, 2003)

In accordance with the memorandum opinion entered this date, the following is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The motion to dismiss, filed by defendants Donal Campbell and Grantt Culliver, on October 7, 2003 (Doc. No. 4), is granted.

(2) Plaintiff David Larry Nelson's complaint, filed on October 6, 2003 (Doc. No. 1), as amended on October 7, 2003 (Doc. No. 10), is dismissed without prejudice.

It is further ORDERED that costs are taxed against plaintiff Nelson, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done, this the 7th day of October, 2003.

/s/ [Illegible]
MYRON H. THOMPSON
UNITED STATES
DISTRICT JUDGE

347 F.3d 910

United States Court of Appeals,
Eleventh Circuit.

David Larry NELSON, Plaintiff-Appellant,
v.
Donal CAMPBELL, in his individual and official capacity as Commissioner of the Alabama Department of Corrections, Grantt Culliver, Defendants-Appellees,

No. 03-15095.

Oct. 8, 2003.

Harriet Victoria Smith, *Michael K. McIntyre*, Law Office of Michael McIntyre, Atlanta, GA, for Plaintiff-Appellant.

J. Clayton Crenshaw, Michael Boysie Billingsley, Alabama Atty. Gen., Montgomery, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before ANDERSON, *HULL* and WILSON, Circuit Judges.

ANDERSON, Circuit Judge:

David Larry Nelson is an Alabama inmate convicted of capital murder and sentenced to death. On October 6, 2003, three days prior to his scheduled execution, Nelson filed a 42 U.S.C. § 1983 action in the Middle District of Alabama. In his complaint, Nelson asserts that he has severely compromised veins and that Alabama's proposed use of a "cut-down" procedure to gain venous access (if access to a suitable vein cannot be achieved) as part of the lethal injection procedure constitutes cruel and unusual

punishment in violation of the Eighth and Fourteenth Amendments.[1] Nelson further asserts a state law claim, pursuant to 28 U.S.C. § 1367, alleging that he has been denied access to his physician in violation of Alabama law. Among other relief, Nelson requests an order granting injunctive relief and staying his execution scheduled for October 9, 2003. By order dated October 7, 2003, the district court dismissed Nelson's complaint for lack of jurisdiction. We affirm.

As we stated in *Hill v. Hopper,* 112 F.3d 1088, 1088-89 (11th Cir.1997), "a prisoner may not circumvent the rules regarding second or successive habeas petitions by filing a § 1983 claim." *See also Felker v. Turpin,* 101 F.3d 95 (11th Cir.1996); *Spivey v. State Bd. of Pardons and Paroles,* 279 F.3d 1301 (11th Cir.2002).

The full procedural history of this case prior to the instant § 1983 claim is set out in detail in *Nelson v. Alabama,* 292 F.3d 1291, 1293-94 (11th Cir.2002). However, for the purposes of this appeal it is sufficient to state that Nelson previously filed a federal habeas petition on April 14, 1997, alleging error due to the trial court's failure to conduct a *Faretta* hearing prior to allowing him to proceed *pro se* at his 1994 re-sentencing hearing. *Nelson v. Alabama,* 292 F.3d at 1294.[2]

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[1] The "cut-down" procedure would require making a two inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The procedure would be performed using local anesthetic.

[2] Additionally, Nelson, through his counsel, acknowledged that he had exhausted all available habeas corpus relief and that he would have to get permission from the Eleventh Circuit in order to file a

(Continued on following page)

Because Nelson has previously filed a federal habeas petition, we are confronted with the question of whether Nelson's complaint seeking relief under 42 U.S.C. § 1983 constitutes the "functional equivalent" of a second or successive habeas petition, such that it would be subject to the requirements of 28 U.S.C. § 2244. *Fugate v. Dep't of Corrs.*, 301 F.3d 1287, 1288 (11th Cir.2002); *Hill v. Hopper,* 112 F.3d at 1089; *Felker v. Turpin,* 101 F.3d at 96. Nelson's § 1983 claim alleges that Alabama's proposed possible[3] use of the "cut-down" procedure to gain venous access as part of the lethal injection procedure constitutes cruel and unusual punishment. We addressed a similar § 1983 claim in *Fugate v. Department of Corrections,* 301 F.3d 1287. The plaintiff in *Fugate* asserted, among other challenges to the State of Georgia's lethal injection procedure, that the use of a "cut-down" procedure in the absence of a suitable vein violated the Eighth and Fourteenth Amendments. Compl. for Injunctive Relief and Decl. J., filed Aug. 12, 2002, ¶¶ 24-28, *Fugate v. Dep't of Corrs.,* No. 02-02219-CV-CC (N.D.Ga. Aug. 13, 2002). On appeal, we held that the district court properly dismissed the § 1983 action to "enjoin and restrain the defendants from executing [Fugate] until they [took] certain measure[s] to minimize the risk of unnecessary pain, suffering and mutilation

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second or successive habeas petition. Tr. of In-Chambers Tel. Conference, Oct. 7, 2003, at *22-23.

[3] We say "possible" because Alabama first proposes to gain venous access through a femoral vein in Nelson's thigh and if unsuccessful through the external carotid artery in Nelson's neck, neither of which procedure Nelson challenges. It is only if venous access cannot be readily gained in those two areas that Alabama proposes to use the third alternative of the "cut-down" procedure.

during the execution process," because the § 1983 action constituted the "functional equivalent" of a second habeas petition. 301 F.3d at 1288. Pursuant to *Fugate,* we conclude that Nelson's § 1983 claim also constitutes the "functional equivalent" of a second habeas petition as it seeks an immediate stay to the imposition of Nelson's death sentence. *See Fugate,* 301 F.3d at 1288; *Spivey v. State Bd. of Pardons and Paroles,* 279 F.3d 1301, 1303 & n. 4. We believe that the instant case is indistinguishable from *Fugate;* both sought to minimize the risk of unnecessary pain during the execution process, and both sought to stay the execution until appropriate corrective measures were taken.

Because Nelson's § 1983 claim was the "functional equivalent" of a second habeas petition and because Nelson did not get our permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim. *Fugate,* 301 F.3d at 1288; *Hill,* 112 F.3d at 1089. Moreover, even had Nelson sought our permission to file a second habeas petition, the facts alleged indicate that Nelson's application would have been denied pursuant to 28 U.S.C. § 2244(b)(2) because his cruel and unusual punishment claim neither "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," nor has a "factual predicate for the claim [that] could not have been discovered previously through the exercise of due diligence . . . [that] if proven and viewed in light of the evidence as a whole, would be sufficient to establish . . . that, but for constitutional error, no reasonable factfinder would have found the applicant

guilty of the underlying offense." *See* 28 U.S.C. § 2244(b)(2); *Felker v. Turpin,* 101 F.3d at 97; *In re Provenzano,* 215 F.3d 1233, 1235-36 (11th Cir.2000) (involving an application for second habeas petition challenging lethal injection as administered by the State of Florida as cruel and unusual punishment and dismissing it because the claim did not meet the requirements of § 2244(b)(2)).

With respect to Nelson's state law claim, we agree with the district court that it is barred by *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1994).

For the foregoing reasons the district court's judgment dismissing Nelson's complaint is affirmed. Nelson's motion to enjoin defendants from executing him is denied.

The judgment of the district court is AFFIRMED[4], and Nelson's motion for stay of execution is DENIED.[5]

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[4] While the dissent's distinction of *Felker v. Turpin, Hill v. Hopper,* and possibly even *Gilreath v. State Board of Pardons & Paroles,* 273 F.3d 932 (11th Cir.2001), may be plausible, we believe its attempt to distinguish *Fugate* is flawed. As noted in our opinion, we do not believe *Fugate* is distinguishable. Fugate was no more attempting to avoid his sentence than is Nelson. Both asserted that they were not challenging their sentence. *See* Compl. for Injunctive Relief and Decl. J., filed Aug. 12, 2002, at *1, *Fugate v. Dep't of Corrs.,* No. 02-02219-CV-CC (N.D.Ga. Aug. 13, 2002) (first sentence) ("Fugate . . . brings this action pursuant to 42 U.S.C. § 1983 challenging not his sentence of death, nor lethal injection as a manner of inflicting death, but the failure of Georgia officials in changing from electrocution to lethal injection to take sufficient measures to minimize the risk of him experiencing extreme and excruciating pain"). In both this case and in *Fugate,* the appellants suggested less painful alternative ways to implement lethal injection. In short, both cases sought to "enjoin . . . the defendants from executing

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WILSON, Circuit Judge, dissenting:

The majority holds that Nelson's Eighth Amendment claim challenging the unique manner of his execution, filed under 42 U.S.C. § 1983, is the "functional equivalent" of a habeas petition, and is therefore subject to the requirements governing second or successive habeas petitions under 28 U.S.C. § 2244. In light of the clear authority indicating that Nelson's claim should be construed exclusively under § 1983, I strongly disagree with the majority's holding.

---

him *until* they take certain measures to minimize the risk of unnecessary pain." *Fugate,* 301 F.3d at 1288 (emphasis added).

We also reject the dissent's suggestion that Nelson's attempt to stay his execution is irrelevant to the "functional equivalent" issue. *See Spivey v. State Bd. of Pardons and Paroles,* 279 F.3d at 1303 (reviewing our decision in *Gilreath* and stating "In reviewing the denial of a motion for preliminary injunction to stay Gilreath's execution, the Court held that '[w]e look at the kind of relief Appellant seeks and conclude that, however the Appellant describes it, the motion was for habeas corpus relief.' "); *see also Spivey,* 279 F.3d at 1304 n. 4 (distinguishing the claim in *Spivey* from the claim in *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), stating "There, no execution date was imminent, and there is no indication that Woodard's claims would necessarily imply a challenge to the imposition of a death sentence."). Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus. *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir.2002), is readily distinguished from the instant case. That case involved no attempt to stay Bradley's execution, and no attempt to interfere with the implementation of the state sentence.

[5] The Appellant's request for oral argument is denied.

Nelson seeks only a temporary stay of execution until concerns regarding the manner of his execution are addressed.[1]

A complaint seeking § 1983 relief in the form of a temporary stay of execution is not automatically equivalent to a successive habeas petition. Before making the determination of whether such a stay should be considered a habeas petition or a civil rights action, the court must inquire into the fundamental question of whether the plaintiff is actually seeking to challenge either the fact of his conviction or the duration of his sentence – the touchstones of habeas relief.[2] If the plaintiff's § 1983 complaint "would necessarily imply the invalidity of his conviction or sentence," the complaint must be dismissed. *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). On the contrary, "if the plaintiff's action . . . even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* In this case, Nelson was

[1] The majority notes that Nelson filed his § 1983 claim only three days prior to his execution. However, the procedure at issue here had never before been implemented in Alabama and prison officials had to craft a special procedure to govern Nelson's execution. It is unclear at what point they finalized the procedure and notified Nelson of it. Even in light of the chance that Nelson seeks redress in the courts solely as a means of delaying the inevitable, the possibility of his only recently being notified of the procedure requires our caution.

[2] A court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court *only on the ground* that he is *in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254 (2003) (emphasis added). Here, Nelson does not make such a challenge.

sentenced to death by lethal injection, not by lethal injection subject to any painful secondary procedure that Alabama state prison officials deem appropriate. He thus challenges neither his conviction nor his sentence. Rather, he requests the opportunity to enforce his Eighth Amendment rights; an opportunity that, as noted by the district court, would be wholly absent if this action were deemed the equivalent of a second habeas petition.

Appellees assert that this case is controlled by this court's decision in *Fugate v. Dep't of Corrs.,* 301 F.3d 1287 (11th Cir.2002) (per curiam). In *Fugate,* an inmate sought a stay of execution, alleging that the manner in which Georgia administered its lethal injections was cruel and unusual under the Eighth Amendment. We held that the district court lacked jurisdiction to consider Fugate's claim because it was the functional equivalent of a second habeas petition, and he had not previously applied to this court for permission to file such a petition under § 2244(b)(3)(A). *See Fugate,* 301 F.3d at 1288. Although the facts in *Fugate* are similar to those in this case, *Fugate* does not control the question before us. Fugate was sentenced to death by lethal injection under Georgia law. By seeking a stay of execution on the basis of a challenge to Georgia's method of administering its lethal injections, Fugate was, in effect, attempting to avoid his specific sentence. Therefore, the decision that Fugate's claim was the "functional equivalent" of a successive habeas petition was reasonable.[3] The same is true of our decisions in *Hill*

[3] Nevertheless, I believe that our decisions in *Fugate* and its prior related cases are questionable under the standards defining habeas actions. A challenge to the *manner* in which an inmate is executed, in

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v. Hopper, 112 F.3d 1088 (11th Cir.1997) (per curiam) (holding that an inmate's constitutional challenge to electrocution as means of execution was the functional equivalent of a second habeas petition) and *Felker v. Turpin,* 101 F.3d 95 (11th Cir.1996) (per curiam). Here, however, Nelson is not seeking to avoid execution by lethal injection under Alabama law. The "cut down" procedure that is to be used in his execution is not within Alabama's execution procedure, nor has it been reviewed to ensure that it passes muster under the Eighth Amendment. Nelson merely requests that a different, more humane procedure known as "percutaneous central venous cannulation" be used to carry out his execution, rather than the outmoded and painful "cut down" procedure. Regardless of which procedure is used, Nelson will be executed by lethal injection in accordance with his sentence. However, with the implementation of the "cut down" procedure, Nelson's Eighth Amendment rights may be compromised in the process.

The district court noted that the rulings of the Eleventh Circuit appear to make a distinction between cases in which a death row inmate's execution is imminent and cases in which execution is not imminent. In *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir.2002), which was decided within weeks of *Fugate,* we held that a death row inmate's § 1983 action for production of DNA evidence was not a

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general, is not necessarily a challenge to the inmate's sentence of death or his conviction. The inmate's execution will presumably proceed, either in the same manner or in a different manner, pending subsequent proceedings. An avenue for review of Eighth Amendment claims must remain available to those facing death at the hands of the state.

successive habeas petition because it "neither directly, nor by necessary implication, attack[ed] the validity of his conviction and sentence." *Bradley,* 305 F.3d at 1288. In his concurrence, and without further explanation, Chief Judge Edmondson stressed that the fact that Bradley did not request a stay of his execution as part of his claim was an "important" part of his decision. *Id.* at 1292 (Edmondson, C.J., concurring).

However, I fail to see the relevance of a request for a stay of execution to the question of whether an action is the equivalent of a habeas petition. In *Gilreath v. State Bd. of Pardons & Paroles,* 273 F.3d 932 (11th Cir.2001) (per curiam), we held that a death row inmate's motion for a preliminary injunction to stay his execution pending an appeal in a clemency proceeding was equivalent to a second habeas petition. However, we did not hold that *every* motion for a stay of execution was tantamount to a petition for habeas relief. In fact, we stated in the opinion that "[w]e look to the kind of relief [the inmate] seeks from the federal courts" in determining whether a petitioner seeks habeas relief. *Id.* at 933. Since the inmate in *Gilreath* sought clemency, or relief from his penalty, it was clear that his petition for a stay of execution was for the purpose of attacking his sentence. Here, Nelson's request for a stay has no bearing on his conviction or his sentence, nor will it ever. If his stay is granted, he will at most have a limited opportunity to pursue his Eighth Amendment claims. Whatever the outcome, Nelson will be executed.

Nelson asks not to be spared; he asks only that he be executed humanely in accordance with his constitutional rights. The bottom line in this case is that the outcome of Nelson's petition has no effect on either his sentence or his conviction, and therefore cannot properly be construed

under any circumstances as the equivalent to a subsequent habeas petition. Therefore, pursuant to *Heck v. Humphrey,* Nelson's § 1983 action should be allowed to proceed. 512 U.S. at 487, 114 S.Ct. 2364. I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15095-P

DAVID LARRY NELSON,

Plaintiff-Appellant,

versus

DONAL CAMPBELL, in his individual and official capacity as Commissioner of the Alabama Department of Corrections, GRANTT CULLIVER,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion October 8, 2003, 11th Cir., 2003, ___ F.3d ___)

(Filed Oct. 9, 2003)

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, BARKETT, HULL, MARCUS, and WILSON, Circuit Judges*.

---

* Honorable Ed Carnes, United States Circuit Judge, recused himself and did not participate in these proceedings.

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is **DENIED**.

The en banc process having been completed, the pending motion to stay the execution during en banc consideration is DENIED as moot.

/s/ J. L. Edmondson
CHIEF JUDGE

(ORDER LIST: 540 U.S.)

THURSDAY, OCTOBER 9, 2003

ORDER IN PENDING CASE

03-6821 NELSON, DAVID L. V. CAMPBELL, COMM'R,
(03A308) AL DOC, ET AL.

The application for stay of execution of sentence of death presented to Justice Kennedy and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-9011

December 1, 2003

Mr. Michael Kennedy McIntyre
507 The Grant Building
44 Broad Street, N.W.
Atlanta, GA 30303

RE: David L. Nelson
v. Donal Campbell, Commissioner, Alabama
Department of Corrections, et al.
No. 03-6821

Dear Mr. McIntyre:

The Court today entered the following order in the above entitled case:

The motion of Alabama Physicians, Laurie Dill, et al. for leave to file a brief as *amici curiae* is granted. The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari are granted limited to the following Question: Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the

execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

Supreme Court, U.S.
FILED
JAN 2 2 2004
OFFICE OF THE CLERK

(2)

No. 03-6821

In The Supreme Court of the United States

DAVID L. NELSON,

Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Nelson v. Campbell*, 347 F.3d 910 (11th Cir. 2003). J.A. 118. The opinion of the United States District Court for the Middle District of Alabama is reported at *Nelson v. Campbell*, 286 F. Supp. 2d 1321 (M.D. Ala. 2003). J.A. 105.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 8, 2003. J.A. 118. A timely petition for rehearing *en banc* was denied on October 9, 2003. J.A. 129. The petition for writ of certiorari was filed on October 9, 2003, and was granted on December 1, 2003. J.A. 132. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law. . . .

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

28 U.S.C. § 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions.
>
> . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> . . . .

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

28 U.S.C. § 2244(b) provides in pertinent part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254 provides in pertinent part:

> (a) [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

In 1994, David Nelson implored a Jefferson County, Alabama, trial jury and circuit court judge to sentence him to death.[1] As he requested, a death sentence was imposed. *Nelson v. Alabama*, 292 F.3d 1291, 1293-94 (11th Cir. 2002).

Mr. Nelson sought to waive his appeals and have an execution date set. *Id.* at 1294. After repeated remands in the Alabama courts as a result of a deficient sentencing order, Mr. Nelson's death sentence was affirmed on appeal. Mr. Nelson did not file an appeal brief in either the Alabama Court of Criminal Appeals or the Alabama Supreme Court. *Id.* He did subsequently challenge his death sentence in a federal habeas corpus application which was denied by the district court; and that court's ruling was affirmed by the Eleventh Circuit Court of Appeals on June 3, 2002. *Id.*

Throughout all of the foregoing proceedings, and as of the time of final disposition by the Eleventh Circuit of Mr. Nelson's single federal habeas corpus petition, the sole method of executing death sentences prescribed by Alabama law was electrocution. On July 1, 2002, the Alabama legislature changed the mode of execution from electrocution to lethal injection. ALA. CODE § 15-18-82.1 (2002).

On April 4, 2003, the Alabama Attorney General's office moved the Alabama Supreme Court to set an

[1] Mr. Nelson's 1980 capital murder conviction had been affirmed in a prior federal habeas corpus application but his death sentence had been reversed. *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993).

execution date for Mr. Nelson. J.A. 81. In response to this request, Mr. Nelson sent a letter to the Attorney General informing the State that Mr. Nelson had "no plans to contest your motion filed with the court," and "I conclude and agree with you that an execution date should be set promptly by the court in the immediate future." J.A. 89. On September 3, 2003, the Alabama Supreme Court scheduled Mr. Nelson's execution for October 9, 2003. Mr. Nelson was to be executed by lethal injection.

Mr. Nelson has severely compromised veins and has encountered repeated problems over the last two decades with prison medical personnel gaining venous access during routine physical examinations. J.A. 7. Prompted by concerns about Mr. Nelson's physical problems, counsel for Mr. Nelson contacted the Holman Correctional Facility Warden, Grantt Culliver, in August 2003.[2] Counsel informed Warden Culliver about these problems and expressed concern about the protocol for gaining venous access for the lethal injection procedure.[3] J.A. 25-26, 92.

Mr. Nelson's counsel requested that Warden Culliver permit either a private physician hired by Mr. Nelson or a

[2] Mr. Nelson was then housed at the William E. Donaldson Correctional Facility ("Donaldson") in Bessemer, Alabama, but was slated to be transferred from Donaldson to the Holman Correctional Facility ("Holman") in Atmore, Alabama, for execution. *See* ALA. CODE §15-18-82 (1975). Subsequent to the setting of Mr. Nelson's execution date by the Alabama Supreme Court on September 3, 2003, the transfer was made. J.A. 7.

[3] During this conversation, counsel also inquired about the possibility that Mr. Nelson could be electrocuted. Warden Culliver informed her that under state law Mr. Nelson no longer had the option of choosing electrocution instead of lethal injection. J.A. 92-93.

prison physician to examine and consult with Mr. Nelson regarding venous access for the lethal injection. J.A. 8. Alternatively, counsel requested that a private physician be permitted to consult with the prison medical personnel who would be performing any procedures necessary for venous access prior to the execution. J.A. 8-9. Warden Culliver assured Mr. Nelson's counsel that a physician would examine and consult with Mr. Nelson about the execution protocol after Mr. Nelson arrived at Holman for execution. J.A. 26. Counsel additionally requested a copy of the Alabama Department of Corrections' written protocol for execution procedures. J.A. 25-26. Warden Culliver refused to provide information about the execution protocol or about any medical procedure that would have to be performed to gain venous access to Mr. Nelson prior to the execution, including information about the "medical personnel" who would be present during the procedure and Mr. Nelson's execution. J.A. 25-26.

Mr. Nelson arrived at Holman Prison in September 2003, however he was never examined by a physician. J.A. 8. Instead, Warden Culliver and a prison nurse met with Mr. Nelson on two occasions. J.A. 11. During the first meeting, which occurred around September 10, 2003 – one month before Mr. Nelson's scheduled execution date of October 9 – Warden Culliver acknowledged that Mr. Nelson lacks superficial peripheral veins adequate to support an intravenous line and that a medical procedure would be necessary to gain venous access prior to the execution. J.A. 10.[4]

[4] The nurse reported to Warden Culliver that "Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line." J.A. 93.

Warden Culliver initially informed Mr. Nelson that in order to gain venous access, a half-inch incision would be made in Mr. Nelson's arm through which a catheter would be inserted into a vein. Mr. Nelson was informed that this procedure was to take place at least twenty-four hours prior to his execution. J.A. 11. On Friday, October 3, 2003 – less than a week before the execution was scheduled to occur – Warden Culliver informed Mr. Nelson and his counsel that the medical procedure that would be used to gain venous access prior to the lethal injection procedure would require not a half-inch incision, but rather a two-inch incision either in Mr. Nelson's leg or arm, with only a local anesthetic being used. J.A. 12, 54. Warden Culliver further informed Mr. Nelson that instead of being performed twenty-four hours prior to the execution, this procedure would begin one hour before the execution. J.A. 12. In describing the procedure to Mr. Nelson's counsel, Warden Culliver claimed that it was not a "cut-down" procedure. J.A. 12.

Mr. Nelson's execution was to be the first time the State of Alabama would ever undertake to perform a medical procedure prior to the execution in order to gain venous access.[5] J.A. 10. At no point prior to the filing of the present lawsuit did the State commit to using qualified medical personnel to perform the potentially dangerous procedure needed to gain venous access to Mr. Nelson,

[5] *See also Nelson v. Campbell*, 347 F.3d 910, 913 n.1 (11th Cir. 2003) (Wilson, J., dissenting) ("the procedure at issue here had never before been implemented in Alabama and prison officials had to craft a special procedure to govern Nelson's execution."). J.A. 124 n.1.

despite Mr. Nelson's requests for such assurance.[6] Prompted by growing concerns aroused by the increasingly apparent likelihood that the State of Alabama had no written medical procedures for gaining venous access prior to the execution of a condemned inmate, on Friday, October 3, 2003, Mr. Nelson's counsel again contacted the Department of Corrections, by both telephone and facsimile, in another effort to gain access to the State's protocol for the lethal injection procedure and the medical procedure that would have to be implemented to gain venous access to Mr. Nelson. J.A. 27. On Friday, October 3, 2003, this request was once again denied. J.A. 28.

On the following Monday, October 6, 2003, Mr. Nelson filed the present legal action pursuant to 42 U.S.C. § 1983 to challenge the State's employment of an invasive, painful and unnecessarily torturous medical procedure to gain venous access prior to the lethal injection. Mr. Nelson alleged that the State's refusal to disclose the Alabama Department of Corrections' written protocol for gaining venous access prior to his execution, combined with the State's proposed method for gaining access to his veins to administer the lethal injection, violated his right to be free from cruel and unusual punishment under the Eighth Amendment. J.A. 5-23. Mr. Nelson sought an order staying his execution, requiring the defendants to provide him with the protocol that they intended to follow, and directing the defendants to "promulgate a protocol concerning

[6] Even after the lawsuit had been filed, the State continued to assert – at a hearing in the district court – that "there's no Constitutional requirement that the prisons use a doctor" to perform this medical procedure. J.A. 58.

venous access that comports with contemporary standards of medical care and the Eighth Amendment to the United States Constitution." J.A. 22.

As is evident from counsel's assertions in the district court, Mr. Nelson's challenge was not to lethal injection as a method of execution, but was limited instead to "how the State of Alabama at the present time intends to to [sic] have venous access on Mr. Nelson." J.A. 69. Mr. Nelson was not "asking ultimately for his execution to be stopped in this suit." J.A. 70. Indeed, counsel agreed that, if the challenge were successful, "all it's going to do is to provide Mr. Nelson with a procedure prior to his execution that meets the Eighth Amendment." J.A. 70.

In response to Mr. Nelson's lawsuit, counsel for the defendant state officials ("the State") acknowledged that "the protocol that is going to be planned for this execution is a little different than the ones that we've had. . . . " J.A. 51. The State's counsel assured the district court that the affidavit of Warden Culliver "outlines that particular protocol" to be employed. J.A. 58. In the district court, the Warden and the State's expert asserted that if venous access could not be obtained in the upper thigh, an attempt would be made to "attach a direct intravenous line to the external carotid vein located in the neck." J.A. 93, 91. If this failed, the State proposed making a two-inch incision in the front part of the arm in order to "isolate and dissect the saphenous vein. . . . " J.A. 91, 93. However, as Mr. Nelson's medical expert – a licensed physician and board-certified practicing anesthesiologist and assistant professor of clinical anesthesiology at Columbia University College of Physicians and Surgeons – reported to the court by affidavit, humans do not *have* an external carotid vein

in the neck.[7] And it is common medical knowledge that the saphenous vein is not located in the arm but in the leg.[8]

The State now described its proposed approach as including a possible "cut-down" procedure. J.A. 87, 91. It said that it would use only a local anesthetic during the "cut-down." J.A. 87, 91. Mr. Nelson, in turn, presented an affidavit from a medical expert explaining that the "cut-down" procedure is an invasive surgical procedure which, when performed without access to "proper medical equipment and supplies" and without the attendance of "experienced and competent assistance" would be intolerably painful and dangerous. J.A. 34-36. When performed in an attempt to gain venous access in a patient with whom peripheral intravenous access attempts have failed, in the manner proposed by the State, the "cut-down" procedure does not comport with contemporary standards of medical care. J.A. 37. The procedure involves making a series of sharp surgical incisions through the skin, the underlying connective tissue, and layers of fat and muscle, until the region surrounding the large vein is reached. J.A. 31, 36. Mr. Nelson's expert explained, the "cut-down" procedure that the State proposed performing utilizing only a local anesthetic is "usually performed under deep sedation . . . because it would otherwise be an extraordinarily disturbing and distressing experience." J.A. 32. In Mr. Nelson's case, a "cut-down" procedure performed on his arm would likely be "technically challenging and painful," and

[7] "The 'external carotid vein' does not exist in human beings." J.A. 99.

[8] Frank H. Netter, M.D., *Atlas of Human Anatomy* 510 (Arthur F. Dalley II, Ph.D., ed., 2d ed. 1997).

ultimately "ineffective," because the veins in his arm are likely "scarred and/or thrombosed (occluded by clot)." J.A. 101.

Complications of the "cut-down" procedure are well-recognized and include severe hemorrhage and pneumothorax, which is the entry of air into the potential space between the lungs and the inner wall of the chest and carries the potential for death by asphyxia and cardiovascular collapse. Other complications include cardiac dysrhythmia, an abnormality of the electrical activity of the heart which can lead to shock with accompanying severe chest pain, nausea, and vomiting. "Cut-downs" can also be extremely painful. J.A. 34-36. The likelihood of these complications occurring substantially increases when the procedure is performed by personnel who are not well experienced in such techniques. Any plan that involves subjecting an individual to a "cut-down" procedure in the hands of inexperienced personnel would represent a clear risk of a "medical misadventure and a botched outcome." J.A. 33.[9]

Federal District Court Judge Myron Thompson acknowledged that Mr. Nelson's challenge to the medically inept and dangerous surgical procedure which the State intended to employ constituted a valid Eighth Amendment claim. J.A. 113. But Judge Thompson nevertheless dismissed the lawsuit for lack of jurisdiction on the ground

[9] A "cut-down" procedure also requires proper equipment both to perform the procedure and to treat the potential complications, including (but not limited to) suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. J.A. 34-36.

that "binding Eleventh Circuit Court of Appeals case law" required him to treat Mr. Nelson's § 1983 complaint as the functional equivalent of a habeas corpus petition. The court declined to assert jurisdiction because Mr. Nelson had previously filed a federal habeas corpus petition and had not sought permission from the court of appeals to file a successive habeas corpus petition under 28 U.S.C. § 2244(b)(3)(A). J.A. 110-12.

On appeal, the Eleventh Circuit Court of Appeals affirmed the jurisdictional dismissal on October 8, 2003, a day before Mr. Nelson's scheduled execution. J.A. 122. The panel majority reasoned:

> Because Nelson's § 1983 claim was the "functional equivalent" of a second habeas petition and because Nelson did not get our permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim. . . . Moreover, even had Nelson sought our permission to file a second habeas petition, the facts alleged indicate that Nelson's application would have been denied pursuant to 28 U.S.C. § 2244(b)(2) because his cruel and unusual punishment claim neither "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," nor has a "factual predicate for the claim [that] could not have been discovered previously through the exercise of due diligence . . . [that] if proven and viewed in light of the evidence as a whole, would be sufficient to establish . . . that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

(citations omitted). J.A. 121-22. Circuit Judge Charles R. Wilson dissented, emphasizing that Mr. Nelson was not challenging his *sentence*, because his sentence was "death by lethal injection, not by lethal injection subject to any painful secondary procedure that Alabama state prison officials deem appropriate." J.A. 125. Therefore, Judge Wilson reasoned that Mr. Nelson's § 1983 claim is not the functional equivalent of a habeas corpus petition, because it "has no bearing on his conviction or his sentence, nor will it ever." J.A. 127.

On October 9, 2003, Mr. Nelson sought and was denied rehearing *en banc*, J.A. 129-30, and petitioned this Court for a writ of certiorari and a stay of execution. The Court stayed Mr. Nelson's imminent execution, *Nelson v. Campbell*, 124 S. Ct. 383 (2003), and on December 1, 2003, granted certiorari limited to the question whether a death row inmate's § 1983 action should be treated as a habeas corpus petition subject to the procedures required for filing successive petitions under 28 U.S.C. § 2244(b)(3)(A). J.A. 132-33.

SUMMARY OF THE ARGUMENT

The Eighth Amendment prohibits the unnecessary and wanton infliction of pain. It permits sentences of death to be carried out, but not in a manner that is more torturous than necessary to extinguish life. As in Mr. Nelson's case, the fact that a proposed means of execution may cause an individual condemned prisoner to suffer needless torment in violation of the Eighth Amendment

may occasionally come to light after the prisoner has completed federal habeas corpus litigation. The successive-application bar of 28 U.S.C. § 2244(b) does not preclude a federal judicial remedy for such Eighth Amendment violations.

Some remedy for injurious violations of the Constitution must be made available if constitutional rights are to be preserved and given any meaningful existence. The failure to provide any remedy for an Eighth Amendment violation would offend longstanding traditions of justice and raise grave constitutional questions. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This Court should not sanction a construction of the relevant federal statutes to produce such a result, particularly when there is nothing in the text of the statutes that would support it.

Although there is no basis in statute or in this Court's caselaw, the Eleventh Circuit has embraced an approach that forecloses all forms of relief for a condemned prisoner who seeks to avert a torturous method of execution that is first proposed after the prisoner has completed a federal habeas corpus proceeding, even where the federal action the prisoner then files does not challenge the underlying conviction or sentence and could not previously have been brought. Applying this Eleventh Circuit rule, the federal district court and the court of appeals below improperly concluded that because Mr. Nelson filed the present lawsuit and request for a preliminary injunction after the end of his federal habeas corpus proceedings, his § 1983 claim constituted the "functional equivalent" of a successive habeas corpus petition and was jurisdictionally barred by the preclusion rules of 28 U.S.C. § 2244(b).

The Eleventh Circuit's shielding of unconstitutional conduct from redress by an unsupported reading of § 2244(b) misconstrues the text and purpose of the statute and ignores this Court's applicable precedent. This Court has held specifically that a lawsuit limited to claims arising for the first time out of the circumstances of a death-sentenced inmate's imminent execution – claims that were premature and unfit for adjudication until just before the execution is carried out – does not constitute a "second or successive" habeas corpus application for purposes of § 2244(b) when it is filed after the denial of habeas corpus relief on an earlier petition challenging the underlying conviction and sentence. *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Because Mr. Nelson is not repetitively or belatedly challenging the legality of his conviction or sentence or seeking relief from either of them, the Eleventh Circuit below erred in treating his § 1983 action as a successive habeas corpus application that had to satisfy § 2244(b)'s gatekeeping requirements for successive petitions, rather than determining whether he satisfied the requirements for stating a § 1983 claim. Mr. Nelson did not ask the courts below and is not asking this Court to prevent his execution. He asks only that the respondent Alabama prison officials be enjoined from torturing him in the process, in violation of the Eighth Amendment. That prayer for relief is squarely within federal § 1983 jurisdiction.

However, even if this Court concludes that the specific form of relief pleaded by Mr. Nelson, an injunctive action under 42 U.S.C. § 1983, is an inappropriate vehicle for raising legitimate time-sensitive Eighth Amendment violations threatened by an unusual execution procedure, it should allow Mr. Nelson to raise those claims in another

form, so that basic constitutional rights are not left unprotected empty promises.

ARGUMENT

I. SERIOUS CONSTITUTIONAL ISSUES MAY EMERGE CONCERNING THE PROCEDURE FOR PUTTING AN INDIVIDUAL CONDEMNED PRISONER TO DEATH – AS THEY EMERGED HERE – AFTER THAT PRISONER'S FEDERAL HABEAS CORPUS PROCEEDINGS HAVE BEEN COMPLETED.

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 392 (1972)). This Court has long held that the Amendment protects prisoners from "the gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183 (citing *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) and *In re Kemmler*, 136 U.S. 436, 447 (1890));[10] *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002). In the capital punishment context specifically, this Court has upheld unique execution procedures that raise unusual issues of potential cruelty only after specifically finding that "[t]here is no purpose to inflict unnecessary pain ... in [a] proposed execution." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). Where the measure of pain inflicted in executing a condemned

[10] "[P]unishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden by ... [the Eighth A]mendment." *Wilkerson*, 99 U.S. at 136. "Punishments are cruel when they involve torture or a lingering death...." *Kemmler*, 136 U.S. at 447.

prisoner results from an unusual circumstance that involves "something more than the mere extinguishment of life," the Eighth Amendment's prohibition against cruel and unusual punishment is obviously implicated. *See Furman*, 408 U.S. at 265 (quoting *Kemmler*, 136 U.S. at 447).

Occasionally, the circumstances giving rise to a constitutional claim of unusual cruelty in the means proposed for conducting an execution do not emerge until shortly before the execution – which will ordinarily be after the condemned prisoner has completed federal habeas corpus proceedings. For example, in Florida, after electrocuted prisoners caught on fire, were burned and charred, and bled excessively during executions, this Court granted certiorari to review the constitutionality of the procedures involved in using Florida's electric chair. *See Bryan v. Moore*, 528 U.S. 960 (1999), *cert. dismissed*, 528 U.S. 1133 (2000) (dismissing the writ after Florida amended its execution procedures to provide an alternative method of execution); *Provenzano v. Moore*, 744 So. 2d 413, 431-36 (Fla. 1999) (Shaw, J., dissenting) (describing the executions of three Florida prisoners), *cert. denied*, 528 U.S. 1182 (2000). By the time of *Bryan*, it had become apparent that Florida's condemned prisoners – both those who had completed federal habeas corpus proceedings and those who had not – alike faced the possibility of unexpectedly torturous and needlessly painful executions raising serious constitutional concerns that merited federal court review.[11]

[11] The execution of Jimmy Lee Gray in Mississippi similarly exposed the existence of previously unperceived but significant constitutional

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Mr. Nelson's case represents an extreme instance of this plight. His federal habeas corpus petition was denied by the district court on August 18, 2000, and its denial was affirmed by the Eleventh Circuit on June 3, 2002. At that time, death sentences in Alabama were carried out by electrocution. On July 1, 2002, Alabama replaced the electric chair with lethal injection as the State's method of execution. It was not until September 2003, when Mr. Nelson was brought to Holman Prison to be executed, that the warden in charge of his execution began making plans for ways to accomplish the injection despite the inaccessibility of Mr. Nelson's veins. And it was only during the days immediately preceding Mr. Nelson's scheduled execution date of October 9, 2003, that the warden finally disclosed his plans, and Mr. Nelson learned that they involved the performance of potentially excruciating surgery – a medically ill-defined and inappropriate "cut-down" procedure – which would be conducted without qualified personnel, proper equipment, or adequate anesthesia. Then, when Mr. Nelson filed a civil rights complaint seeking to enjoin this "cut-down"

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claims. During his execution by gas, prison officials were forced to clear the room after Mr. Gray's desperate gasps for air during the procedure repulsed witnesses. *See* Dan Lohwasser, United Press International, Domestic News, September 2, 1983, *available in* LEXIS, Nexis Library, UPI File. A reporter who witnessed the execution stated that over the course of eight minutes, Mr. Gray's "head dropped and he appeared dead, but each time it snapped up, striking with an audible clang a steel pole running from floor to ceiling behind his seat." *Id.* "I thought I had some pretty hard bark on me from being in Vietnam, but I was pretty shook up. There was a steel pole running from the floor to the ceiling behind Gray's chair, and we watched him slam his head into the pole for eight minutes as hard as he could." *See* Eileen Keerdoja, *A "Civilized" Way to Die?*, Newsweek, Apr. 9, 1984, at 106.

procedure as a violation of the Eighth Amendment, the courts below concluded that they had no jurisdiction to hear such a claim, because his lawsuit had to be treated as a habeas corpus petition and would constitute Mr. Nelson's "second" habeas corpus petition, whereas 28 U.S.C. § 2244(b) limits prisoners in Mr. Nelson's situation to just one.

II. THE FAILURE TO PROVIDE ANY REMEDY FOR EIGHTH AMENDMENT VIOLATIONS IN THESE UNUSUAL SITUATIONS WOULD OFFEND LONGSTANDING TRADITIONS OF JUSTICE AND RAISE GRAVE CONSTITUTIONAL QUESTIONS THAT CAN READILY BE AVOIDED BY A PROPER INTERPRETATION OF THE APPLICABLE FEDERAL STATUTES.

In Mr. Nelson's § 1983 case, the district court forthrightly described the consequences of the "binding Eleventh Circuit"[12] rule that it felt compelled to follow in recharacterizing his § 1983 complaint as a habeas corpus petition in order to dismiss it as a "second . . . application"[13] for the writ forbidden by 28 U.S.C. § 2244(b):

> The court recognizes that the import of the dismissal of this lawsuit is that Nelson will be effectively left without a federal forum for review of his Eighth Amendment claim.
>
> . . . .
>
> The rule that a § 1983 action seeking a stay of execution must be treated as a habeas petition

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[12] *Nelson v. Campbell*, 286 F. Supp. 2d 1321, 1324 (M.D. Ala. 2003).

[13] *Id.* at 1324 n.13.

> means that, after a death row inmate has filed his first federal habeas petition, he can never obtain a stay of execution from a federal court so that court can review . . . an Eighth Amendment claim regarding any later decision as to how the execution is to be carried out. The rule means that no matter how meritorious Nelson's claim is, and despite the fact that he could not raise his claim in his earlier habeas petition, there seems to be no way for him to obtain federal relief now.

Nelson v. Campbell, 286 F. Supp. 2d at 1325. The Eleventh Circuit's affirmance of the district court relied upon this rule – that any federal action instigated by a death row prisoner to challenge violations of constitutional rights that occur after the close of his initial federal habeas corpus proceedings must be construed as a successive habeas corpus petition.[14]

As the district court plainly (though politely) implies, such a result is refractory to reason. It is also radically at odds with the fundamental tenet of the Anglo-American

[14] The Eleventh Circuit determined that:

> [b]ecause Nelson's § 1983 claim was the functional equivalent of a second habeas petition and because Nelson did not get our permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim. Moreover, even had Nelson sought our permission to file a second habeas petition, the facts alleged indicate that Nelson's application would have been denied pursuant to 28 U.S.C. § 2244(b)(2). . . .

Nelson v. Campbell, 347 F.3d 910, 912 (11th Cir. 2003) (citations and internal quotations omitted).

legal tradition expressed in the maxim *ubi jus, ubi remedium* – where there's a right there's a remedy – a maxim classically viewed as central to the rule of law. Chief Justice Marshall in *Marbury v. Madison* quoted Blackstone[15] for the proposition that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded,'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803);[16] and the Chief Justice added that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

This is neither a transitory nor a parochial notion.[17] It goes to the heart of due process.[18] To deprive an individual

[15] 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

[16] *See also, e.g., Ex parte Young*, 209 U.S. 123, 165 (1908); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Alden v. Maine*, 527 U.S. 706, 811-12 (1999) (dissenting opinion of Justice Souter). In *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66-67 (1992), the Court, after quoting *Marbury*'s reference to Blackstone, added that "it has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist." *Id.* at 67 (quoting *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838)).

[17] *See, e.g.*, Article XVIII of the American Declaration of the Rights and Duties of Man:

> *Article XVIII*: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

[18] Again in Chief Justice Marshall's words in *Marbury*, 1 Cranch at 163:

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of recourse to a forum necessary for the vindication of his or her rights and to do so arbitrarily, on the basis of an accident of timing over which she or he had no control, would violate due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). To construe a statute as having this perverse effect and to do so "without any clear indication that such was Congress' intent,"[19] would create unnecessary and serious constitutional problems under the Due Process Clause; and to construe a silent habeas corpus statute in this manner would create serious Suspension Clause problems as well.[20] The Court does not read statutes in this manner.[21]

Here there is no need or reason whatsoever to do so. The Eleventh Circuit has turned 28 U.S.C. § 2244(b) on its

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> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

[19] *United States v. Castro*, 124 S. Ct. 786, 791 (2003).

[20] *See I.N.S. v. St. Cyr*, 533 U.S. 289, 300-04 (2001). Because the present case does not involve the use of habeas corpus "to allow a final judgment of conviction in a state court to be collaterally attacked," *Felker v. Turpin*, 518 U.S. 651, 663 (1996), the Suspension Clause concern here, as in *St. Cyr* and *Felker*, does not require the Court to consider the vexed issue whether "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* at 664.

[21] *See, e.g., United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909) (when a statute is subject to two interpretations, the construction that saves it from constitutional infirmity will be adopted); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (same); *United States v. C.I.O.*, 335 U.S. 106, 120-21 & n.20 (1948) (same); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961) (same).

head with no regard for its text, its manifest purpose, or this Court's prior construction of it. Congress enacted § 2244(b) to prevent state prisoners from using federal habeas corpus proceedings to attack their convictions or their sentences repetitiously or dilatorily. The Eleventh Circuit has converted § 2244(b) into a bar against the provision of *any* federal forum to a state prisoner who is *not* attacking either a conviction or a sentence but is seeking one and *only one* opportunity to present an Eighth Amendment claim of needless cruelty *at the first opportunity after the prisoner learns that a state prison official has decided to execute the sentence in a wantonly torturous manner.*

That this is a misconstruction of the statute is apparent from any fair reading of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). This Court held in *Stewart* that a federal habeas corpus petition presenting claims arising in the first instance out of the circumstances of a death-sentenced inmate's imminent execution – claims that were premature and unfit for adjudication until just before the execution was carried out – is not a "second or successive" petition for purposes of § 2244(b) when filed by an inmate who has earlier litigated and lost a habeas corpus proceeding raising claims that challenged the validity of the underlying conviction and sentence. *Id.* at 644-45. *Stewart* establishes that even if Mr. Nelson had filed a document captioned as an application for a writ of habeas corpus, it would not have been "a second or successive habeas corpus application" within the meaning of § 2244(b). And this is relevant as well to his entitlement to proceed by way of a civil rights action under 42 U.S.C. § 1983, because the only conceivable bar to such a proceeding would be a drastic extension of the holding in *Preiser v. Rodriguez*, 411 U.S.

475 (1973), that certain sorts of claims should be pursued only through a habeas corpus petition, not under § 1983. But a major reason for that ruling in *Preiser* was to prevent state prisoners from using § 1983 actions to evade the procedural limitations of federal habeas corpus practice – such as, in the view of the court of appeals in the present case, § 2244(b)'s prohibition of most second and successive petitions. Conversely, if § 2244(b) as construed in *Stewart* would *not* bar Mr. Nelson from raising his Eighth Amendment challenge to the "cut-down" procedure in a habeas corpus proceeding, there is no reason to stretch *Preiser* to cover his case. Mr. Nelson discusses *Preiser* more fully in section III.A of this brief, and then returns to *Stewart* in his discussion of the Eleventh Circuit's opinion in section IV.

III. UNDER A PROPER CONSTRUCTION OF 28 U.S.C. § 2244(b) AND 42 U.S.C. § 1983, A FEDERAL COURT DOES NOT INVARIABLY LOSE JURISDICTION TO ENTERTAIN AN OTHERWISE COGNIZABLE § 1983 ACTION SIMPLY BECAUSE THE PLAINTIFF HAS PREVIOUSLY SOUGHT FEDERAL HABEAS CORPUS RELIEF ON UNRELATED GROUNDS.

The decisions of the courts below precluding Mr. Nelson from consideration of the merits of his Eighth Amendment claim in any form of action rest upon a rule extrapolated from 28 U.S.C. § 2244(b) and progressively extended in a series of Eleventh Circuit cases. The rule is that a state prisoner who has unsuccessfully conducted a habeas corpus proceeding challenging his conviction and sentence cannot file a later legal action, however pleaded in law and in fact, challenging anything done to him in the

course of executing that sentence, unless he seeks and receives authorization from the court of appeals to file a "second or successive habeas corpus application" under the largely preclusive standards of § 2244(b).[22] The rule allows for no exceptions in the case of prisoners whose claims in the later legal action *could not* have been presented in their earlier habeas corpus proceeding – because, for example, the events giving rise to the claims had not yet occurred and were not foreseeable at the time of that proceeding. Claims of this kind cannot be raised at all in the Eleventh Circuit because, by definition, they are always either too early or too late.

One would suppose that a result so "seemingly perverse" would not be embraced by a court without some strong anchor in the statutory text. *Stewart*, 523 U.S. at 644. However, there is nothing in the language or the structure of § 2244(b) which remotely suggests that all post-habeas corpus filings are to be construed as successive habeas corpus applications. Nor does the manifest purpose of the statute – to promote finality by forbidding repetitious or dilatory challenges to a state prisoner's conviction or sentence – support the Eleventh Circuit rule deeming claims that could never previously have been

[22] 28 U.S.C. § 2244(b) requires petitioners who seek to file a "second or successive" habeas corpus petition to first obtain leave from the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A). *See Felker v. Turpin*, 518 U.S. 651 (1996). Authorization can be obtained only if the petition would raise a new claim and if that new claim relies on a new rule of constitutional law made retroactive to cases on collateral review by this Court or else relies on newly discovered evidence which could not have been discovered earlier through the exercise of due diligence and which would establish the petitioner's innocence of the underlying offense by clear and convincing evidence. 28 U.S.C. § 2244(b)(2).

raised to be the subjects of a "second or successive application."

The Eleventh Circuit began its expansion of this doctrine in *In re Medina*, 109 F.3d 1556 (11th Cir. 1997), when it took the position that, "the provisions of § 2244(b), as amended, operate to foreclose review of competency to be executed claims in second habeas applications," *id.* at 1564, even where such claims could not have been raised in the petitioner's first application. After this Court rejected that position in *Stewart v. Martinez-Villareal*, the Eleventh Circuit continued to bar competency-to-be-executed claims filed after a first habeas corpus application as "successive" unless the unripe claim *was* previously raised in the first petition.[23] *See In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000) (holding that *Medina* forecloses the circuit court from granting a petitioner authorization to file a second habeas corpus petition raising a previously unraised claim of incompetence to be executed).

The Eleventh Circuit has proceeded to extend this rule in a variety of contexts. For example, contrary to most federal circuits,[24] the Eleventh Circuit has announced a

[23] This issue was expressly left open by this Court in *Stewart*, 523 U.S. at 645 n.1.

[24] *See Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003) (Rule 60(b) motion is not automatically a successor under the AEDPA); *Gitten v. United States*, 311 F.3d 529, 530 (2d Cir. 2002) (same); *United States v. Winestock*, 340 F.3d 200, 206-07 (4th Cir. 2003) (same); *Dunn v. Cockrell*, 302 F.3d 491, 492 n.1 (5th Cir. 2002) (per curiam) (same); *Dunlap v. Litscher*, 301 F.3d 873, 875-76 (7th Cir. 2002) (same); *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (same); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (a bright line rule equating all Rule 60(b) motions with successive habeas corpus petitions would be improper). The Sixth Circuit has similarly held that the requirements

(Continued on following page)

"bright line rule that the successive-petition restrictions in § 2244(b) apply to *all* Rule 60(b) motions filed by habeas petitioners." *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (citation and internal quotations omitted) (emphasis added). *See also Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996) ("[w]e hold that the successive petition restrictions contained in the amendments to § 2244(b) apply to Rule 60(b) proceedings"). In *In re Medina* itself, the court applied the gatekeeping restrictions of § 2244 to bar a Rule 60(b) motion seeking to raise a claim of incompetence to be executed. *Medina*, 109 F.3d at 1561.[25]

Challenges to cruel and unusual punishment brought under § 1983 have been barred uniformly as successive petitions. *See, e.g., Fugate v. Dep't of Corr.*, 301 F.3d 1287 (11th Cir. 2002) (§ 1983 cruel-and-unusual punishment claim challenging lethal injection had to be treated as second habeas corpus application); *Hill v. Hopper*, 112 F.3d

of § 2244 do not automatically apply to every post-habeas corpus filing. *Workman v. Bell*, 227 F.3d 331, 334-35 (6th Cir. 2000) (en banc) (addressing motion to recall mandate, court stated that cases of fraud upon the court are excepted from the requirements of § 2244).

[25] There has been some dissent from the Eleventh Circuit's subjection of all Rule 60(b) motions to § 2244(b) preclusion even "where a Rule 60(b) motion filed by a habeas corpus petitioner is not meant to circumvent 28 U.S.C. § 2244(b), but instead seeks the particular relief which that Federal Rule of Civil Procedure specifically provides." *Mobley v. Head*, 306 F.3d 1096, 1102 (11th Cir. 2002) (Tjoflat, J., dissenting), *hearing en banc pending as ordered by Gonzalez v. Sec'y for Dept. of Corr.*, 326 F.3d 1175 (11th Cir. 2003). Judge Tjoflat opined that "it would be a miscarriage of justice if we turned a blind eye to such abuse of the judicial process" even though the claim would not meet the requirements of § 2244. *Mobley*, 306 F.3d at 1105 (Tjoflat, J., dissenting).

1088 (11th Cir. 1997) (§ 1983 cruel-and-unusual punishment claim challenging electrocution had to be treated as a second habeas corpus application). And in other settings where § 1983 petitioners have sought relief that would not invalidate their conviction or sentence, the Eleventh Circuit has also persistently dubbed the proceeding a banned "second or successive" habeas corpus application. *See, e.g., Gilreath v. State Bd. of Pardons and Paroles*, 273 F.3d 932 (11th Cir. 2001) (barring § 1983 action challenging clemency procedures as successive petition); *Spivey v. State Bd. of Pardons and Paroles*, 279 F.3d 1301 (11th Cir. 2002) (same).

There is no basis in statute, authoritative precedent, or logic for this kind of transmogrification of § 2244(b) into an absolute bar against judicial relief for constitutional violations that are raised in a timely manner for the first time when they first arise and become legally actionable. To the contrary, this Court has consistently rejected the view that § 2244(b) bars consideration of the merits of a ripened constitutional claim that was not adjudicated in a prisoner's prior habeas corpus proceeding, noting that to apply § 2244(b) to such claims would undermine sensible habeas corpus practice. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998); *see also Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)) (holding that a federal habeas corpus petition filed after dismissal of an initial filing because the petitioner had failed to exhaust state remedies should not be deemed a second or successive petition, lest "the complete exhaustion rule" become a "trap" for "the unwary pro se prisoner."). This Court rejected the notion that Congress silently excluded competency-to-be-executed claims from federal habeas corpus review because the prohibition as

"successive" of an entire category of never-previously-raised claims would involve an interpretation of § 2244(b) whose "implications for habeas practice would be far reaching and seemingly perverse." *Stewart*, 523 U.S. at 644. And the same perverseness would have to be imputed to § 2244(b) to construe it as prohibiting federal habeas corpus review of every possible execution-related constitutional claim – however meritorious – simply because such claims *cannot* be raised before they become ripe and will be deemed by Eleventh Circuit logic to be "second or successive" if first raised *after* they become ripe.

IV. WHEN A PREVIOUSLY UNAVAILABLE CLAIM THAT DOES NOT INVALIDATE A CONVICTION OR SENTENCE IS OTHERWISE COGNIZABLE UNDER § 1983 – AS IS MR. NELSON'S – A FEDERAL COURT IS NOT JURISDICTIONALLY BARRED FROM REVIEWING THE CLAIM SIMPLY BECAUSE THE CLAIMANT IS A PRISONER WHO HAS COMPLETED FEDERAL HABEAS CORPUS PROCEEDINGS.

As the State began its preparation for Mr. Nelson's lethal injection, he was informed that he would be subject to the potentially torturous "cut-down" procedure. Counsel ascertained that the law in the Eleventh Circuit foreclosed any access to habeas corpus relief because Mr. Nelson had already completed one federal habeas corpus proceeding. *See In re Provenzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), and the similar cases discussed *supra* in section

III.[26] Time being of the essence, counsel sought protection for his client's Eighth Amendment rights through the form of action most likely to proceed quickly through the lower courts: an emergency pleading for relief under 42 U.S.C. § 1983, J.A. 5, with a prayer for "an order granting injunctive relief and staying the Plaintiff's execution." J.A. 22.

Section 1983 is an appropriate vehicle for Mr. Nelson's claim. In terms, it authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Mr. Nelson's invocation of the Eighth Amendment to challenge the State's threatened use of a painful, needlessly invasive and potentially traumatic "cut-down" procedure prior to his execution unquestionably pleads a valid cause of action under 42 U.S.C. § 1983. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The gist of Mr. Nelson's lawsuit was to require the State of Alabama to use some medically appropriate and humane procedure in extinguishing his life. If, as is clear, § 1983 gives a cause of action for an injunction against state correctional officials who persist in maintaining barbaric conditions of confinement, *see, e.g., Hutto v. Finney*, 437 U.S. 678 (1978), it can hardly be thought *not* to give a cause of action for an injunction against state

[26] Counsel's analysis of Eleventh Circuit law was subsequently confirmed by the court of appeals in its opinion below. *Nelson v. Campbell*, 347 F.3d 910, 912 (11th Cir. 2003) (noting that all claims would have been barred under § 2244(b)).

correctional officials who insist on inventing a barbaric method of execution.[27]

Although many claims of constitutional rights or immunities in connection with state criminal process can be raised only by a petition for a writ of habeas corpus, *see Preiser v. Rodriguez*, 411 U.S. 475 (1973), other claims remain squarely within the ambit of § 1983. The decisive question is whether recognition of the claim will necessitate a finding that a state prisoner's underlying conviction or sentence is invalid. If so, then the prisoner must file a

[27] The Civil Rights Act was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise . . . [the States might deny citizens their] rights, privileges, and immunities guaranteed by the Fourteenth Amendment." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Services*, 436 U.S. 658 (1978) (municipalities and other local governments are "persons" to whom Civil Rights Act applies). It is precisely this sort of callous indifference that has guided the State's reaction to Mr. Nelson's constitutional concerns throughout. Had there been no federal forum in which Mr. Nelson could seek to hold state officials to constitutional account, it is likely that those officials would never even have given Mr. Nelson any information regarding the potentially torturous procedure devised for his execution. And when they did eventually respond in court by revealing a protocol of the procedure to be used to gain venous access – described in affidavits by Warden Culliver and Dr. Marc Sonnier – this protocol still failed to provide information about the qualifications of the personnel to be performing the procedure or the conditions under which it was to be performed. Worse, as Mr. Nelson's medical expert observed in an affidavit in the district court, the references by both Warden Culliver and Dr. Sonnier to a body part that does not exist, J.A. 99-100, suggest that "Dr. Sonnier is acting under instruction from Mr. Culliver, and that these instructions include specification of technical medical issues that are likely to be beyond the professional training and credentialing of Mr. Culliver." J.A. 100. This performance evinces a shocking level of reckless indifference by state authorities to federal constitutional rights.

habeas corpus petition; the prisoner cannot proceed in a civil action under § 1983. *Preiser*, 411 U.S. at 500 ("when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.").

Conversely, where, as in Mr. Nelson's case, a claim of unconstitutionality is lodged against procedures deployed or threatened under color of state law that are merely auxiliary to the prisoner's conviction and sentence and can be restrained or corrected without impugning the integrity of the underlying conviction and sentence, then § 1983 relief is available. *Wolff v. McDonell*, 418 U.S. 539 (1974) (holding that § 1983 was a permissible avenue of relief when adjudication of a prisoner's claim would not undermine the outcome of disciplinary proceedings); *see also Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (recognizing that state prisoners may seek redress under § 1983 if a judgment in the prisoner's favor would not "necessarily imply" the invalidity of his or her conviction or sentence).

In *Heck*, this Court analyzed both *Preiser* and *Wolff* and made clear where the line between them lies. "Like *Preiser, Wolff* involved a challenge to the procedures used by state prison officials to deprive prisoners of good-time credits. The § 1983 complaint [in *Wolff*] sought restoration of good-time credits as well as 'damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures.'" *Heck*, 512 U.S. at 482 (quoting *Wolff*, 418 U.S. at 553). *Heck* explains *Wolff*'s two-part holding – that the claim for good-time credits was foreclosed by *Preiser* but "the damages claim was nonetheless 'properly before the district court and required

determination of the validity of the procedures employed for imposing sanctions, including loss of good-time,'" *Heck*, 512 U.S. at 482 (quoting *Wolff*, 418 U.S. at 554) – as follows:

> In light of . . . [*Wolff*'s] earlier language characterizing the claim as one of "damages for the deprivation of civil rights," rather than damages for the deprivation of good-time credits, we think this passage recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.,* denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

Heck, 512 U.S. at 482-83.

Mr. Nelson's complaint, like the ones which the Court in *Wolff* and *Heck* held cognizable under § 1983, is precisely that Alabama's prison officials are about to violate his Eighth Amendment rights by "using the wrong procedures" (*i.e.*, unnecessarily torturous ones) *not* that those procedures will produce "the wrong result" (*i.e.*, his death.) Mr. Nelson does not contest the State's right to execute him; he seeks only that the execution be performed humanely. As he has repeatedly stated throughout this § 1983 lawsuit, he does not challenge the State's legal authority to execute him or the constitutionality of his sentence. J.A. 69-70. He challenges nothing more than the gratuitous infliction of pain and avoidable suffering that the State's proposed "cut-down" procedure will entail. Since this violation of the Eighth Amendment can and should be remedied without calling into question in any

way the validity of his underlying conviction or sentence, he may challenge it in a civil rights injunctive suit under § 1983 under the square holding of *Wolff* and the explicit analysis in *Heck*.[28]

Similarly, because Mr. Nelson has not challenged the lawfulness of his sentence or the State's entitlement to execute him humanely, his § 1983 action to restrain the State from performing an unconstitutionally torturous "cut-down" procedure prior to his execution cannot be fairly regarded as an attempt to "circumvent the rules regarding second or successive habeas petitions." *Nelson v. Campbell*, 347 F.3d at 911. Although he requested a preliminary injunctive order staying his execution – a point the Eleventh Circuit Court of Appeals thought

[28] Circuit courts elsewhere than in the Eleventh Circuit have followed *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) – which addressed Ohio's clemency procedures in a § 1983 action brought by a death row inmate – in recognizing the legitimacy of § 1983 suits as a vehicle for condemned inmates (including those who have completed federal habeas corpus proceedings) to challenge a State's deprivation of the "minimal" procedural due process rights vouchsafed by *Woodard* in clemency proceedings, *id.* at 289. *See Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000) (granting stay of execution to permit the district court to consider the validity of a challenge to improper state interference in clemency proceedings); *Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998) (upholding a district court's denial on the merits of a death row prisoner's request for a temporary restraining order filed in conjunction with a challenge to clemency procedures while recognizing the legitimacy of § 1983 generally); *Wilson v. United States Dist. Court for the N. Dist. of California*, 161 F.3d 1185 (9th Cir. 1998) (rejecting state's challenge to a district court's grant of a temporary restraining order staying an execution in a challenge to clemency procedures). *Contra*, *Spivey v. State Bd. of Pardons and Paroles*, 279 F.3d 1301 (11th Cir. 2002) (holding that a § 1983 complaint challenging the propriety of clemency proceedings must be recharacterized as a successive habeas corpus application).

particularly significant, *see id.* at n.4, this request was necessitated solely by the insistence of state officials upon their chosen "cut-down" technique for acquiring venous access, and was not aimed at halting or delaying the execution itself. Even after Mr. Nelson filed his complaint alleging a violation of the Eighth Amendment and seeking a stay, the State had the opportunity to ensure that his execution would proceed on schedule by adopting any procedure for gaining access to his veins that comported with contemporary medical standards for avoiding needless agony and the risk of "medical misadventure and a botched outcome." J.A. 33. However, the State declined the district judge's request to consider "a procedure that would be acceptable to both sides," J.A. 73, and thus required that the stay be sought which was eventually granted by this Court.

The stay is, of course, temporary; and that is as Mr. Nelson wishes it to be. For if, in the end, he is permitted to proceed in federal court and there obtains a favorable adjudication of his Eighth Amendment claim, the immediate result will be to let the State execute him and thus accomplish its ultimate objective as well. Under these circumstances it is demonstrably incorrect to say, as the court of appeals below did, that "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot [properly] be accomplished by a successive petition for habeas corpus." *Nelson*, 347 F.3d at 913 n.4. What is "directly imped[ing] the implementation of the state sentence," *id.*, in Mr. Nelson's case, and has impeded it from the outset, is Warden Culliver's adamant insistence on a needlessly torturous way of

accomplishing the fatal result that both Mr. Nelson and the State of Alabama want to see promptly accomplished.

V. IF RECHARACTERIZATION OF MR. NELSON'S § 1983 COMPLAINT IS PROPER, THE COMPLAINT SHOULD BE ENTERTAINED AS A FEDERAL HABEAS CORPUS PETITION BY THE DISTRICT COURT WITH NO NEED FOR PRIOR AUTHORIZATION BY THE COURT OF APPEALS BECAUSE IT IS NOT A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION WITHIN THE MEANING OF 28 U.S.C. § 2244(b).

As we have said above, and as Mr. Nelson explicitly told both courts below, he seeks only an adjudication of his claim that Alabama's proposed "cut-down" procedure would violate his Eighth Amendment right against cruel and unusual punishment. Such a claim could not have been presented in his previous federal habeas corpus proceeding because it was premature when that proceeding was maintained and finally adjudicated. Indeed, throughout the period of that proceeding, the State of Alabama executed death sentences by electrocution, not by lethal injection. It is not difficult to imagine what sort of ruling the federal habeas court at that time would have rendered if Mr. Nelson had undertaken to challenge any potential secondary procedure that might become necessary if and when Alabama subsequently elected to replace electrocution with lethal injection – or with the gas chamber, hanging, or whatever other new methods of execution the future could bring. The challenge would unquestionably have been viewed by the courts as ridiculously premature. For that reason, 28 U.S.C. § 2244(b) erects no bar to Mr. Nelson's presentation of the claim in a habeas corpus

petition after the legal and factual grounds for the challenge did mature. *Stewart v. Martinez-Villareal* squarely so holds. And this result is eminently correct, for nothing in § 2244(b) remotely implies any congressional intent to foreclose all avenues of relief for a death-sentenced prisoner who seeks legal redress against an unconstitutional execution procedure which became known – indeed, which was first devised – only after his or her federal habeas corpus proceedings had been concluded.

David Nelson's fundamental entitlement to present his claim should not depend, we believe, upon the mechanism of his request – a § 1983 action – however proper that mechanism is (as we have shown it to be above), but rather on the substance of that claim. If this Court deems some other vehicle more appropriate, Mr. Nelson requests that the Court permit him to pursue that remedy. If the Court sees any reason why his § 1983 complaint should be recharacterized as a habeas corpus application, it would nonetheless not be a "second or successive" application for the writ according to *Stewart*. Hence, Mr. Nelson should be entitled to pursue it in the district court without "gatekeeper" authorization under 28 U.S.C. § 2244(b)(3).

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be reversed and the case remanded to permit Mr. Nelson to present the merits of his Eighth Amendment claim to the district court.

Respectfully submitted,

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In the

Supreme Court of the United States

DAVID L. NELSON,
Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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QUESTION PRESENTED

Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254.

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INTRODUCTION

Triple murderer David Larry Nelson has been on Alabama's death row for more than 20 years. On March 24, 2003, after his case had made three full trips through the state-court system and another two through the federal system, this Court denied Nelson's petition for a writ of certiorari from the denial of his federal habeas corpus petition. *Nelson v. Alabama*, 538 U.S. 926 (2003). Given that Congress has, subject to two narrow exceptions that Nelson has conceded do not apply here (App. 69-70), expressly prohibited inmates from filing "second or successive" federal habeas petitions, 28 U.S.C. § 2244(b)(2), this Court's order denying certiorari seemingly brought to an end Nelson's repeated attacks on his conviction and sentence.

Then, on October 6, 2003, just three days before his scheduled execution, Nelson, ostensibly proceeding under 42 U.S.C. § 1983, filed a pleading styled a "Complaint for Injunctive and Declaratory Relief." In that "Complaint," Nelson, a long-time IV drug abuser with "compromised veins," alleged that the use of a "cut-down" procedure to administer his execution by lethal injection would violate the Eighth Amendment and, on that basis, sought "an order granting injunctive relief and staying [his] execution." App. 22. The lower courts saw Nelson's nominal § 1983 complaint for what it is — a transparent, last-minute effort to derail his execution and to circumvent Congress' considered judgment effectively barring successive habeas corpus petitions — and dismissed it as "the 'functional equivalent' of a second habeas petition." App. 121.

Nelson's argument in this Court essentially proceeds as if neither the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[1] nor this Court's decisions in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Gomez v. United States District Court*, 503 U.S. 653 (1992), ever happened. The lower

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[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

courts rightly rejected Nelson's manipulative end-run. The Eleventh Circuit's judgment should be affirmed, and the stay of execution lifted.

STATEMENT OF THE CASE

A. Nelson's Crimes

On New Year's Eve 1977, Nelson and his girlfriend, Linda Vice, met James Dewey Cash, a cab driver, at the Red Dog Saloon in Birmingham. *Nelson v. State*, 511 So. 2d 225, 232 (Ala. Crim. App. 1986). "Cash was going to a party, and he asked [Nelson] and Vice if they wanted to go with him. They agreed, and the three of them left in Cash's taxicab, with Cash driving." *Id.* "After driving a few blocks, ... [Nelson] pulled out [a] pistol and told Cash to hand over his money." *Id.* When Nelson tried to rob Cash of his watch, "Cash grabbed the barrel of the pistol and [Nelson] started firing." *Id.* at 233. "[O]ne bullet hit Cash in the chest, one hit him in the head, and one hit the window." *Id.* Vice and Nelson fled, leaving Cash's body at the scene. *Id.*

Having killed Cash, Nelson went with Vice to another bar where they met Wilson W. Thompson. *Id.* at 229. Nelson introduced Vice to Thompson as his sister and told Thompson that he and Vice had no way home. *Id.* "Thompson and Nelson discussed going to Thompson's mobile home in Kimberly, [Alabama,] which was twenty to thirty miles from Birmingham, and having an 'orgy.'" *Id.* The three left the bar in Thompson's car and headed for Thompson's home. *Id.*

When they arrived, "Thompson fixed everyone a drink." *Id.* Then, "[a]fter some further discussion of orgies, Nelson ordered Vice to remove her clothes." *Id.* When Vice expressed reluctance, Nelson took her into the bedroom, where he again demanded that she "take something off." *Id.* As she removed her blouse, Thompson, who was now nude, entered the room and told Vice to take off the rest of her clothing. *Id.* She did so and then, at Nelson's direction, lay down on the bed. *Id.* "Nelson then told Thompson he could

have oral sex with Vice. Just as Thompson commenced performing oral sex on Vice, Nelson shot him in the back of the neck at close range with [a] .38 caliber pistol." *Id.*

"The bullet apparently passed through Thompson's neck and wounded Vice in the upper part of her leg." *Id.* When Vice started screaming, Nelson shot her twice more; "one bullet wound[ed] her in the wrist and the other graz[ed] the back of her head." *Id.* Nelson then pistol-whipped Thompson in the back of the head and proceeded to "ransack[]" the mobile home. *Id.* "Nelson returned to the bedroom and, upon finding Vice alive, displayed his penis and tried to get Vice to perform oral sex upon him." *Id.* When she refused, "telling him that she was dying and he was not going to make her do anything else," Nelson "threw a blanket over her and walked out." *Id.*

Fortunately, Vice survived Nelson's attack. Thompson, whose nude body police discovered lying face down on the bed, was not so lucky. "When the bullet passed through [Thompson's] neck, it caused major damage to the spinal cord, terminating the function of all vital organs below the neck and causing death to quickly follow." *Id.* at 230.

B. Procedural History

The procedural history culminating in Nelson's last-minute stay request is tortured and, for the most part, irrelevant to the resolution of this case. Several aspects of that history are pertinent, however. First, it was Thompson's murder – the third of Nelson's three murders – for which Nelson received the death sentence at issue here. (Nelson was convicted and sentenced to life imprisonment for Cash's murder; before that, Nelson had pled guilty to the unrelated murder of Oliver King. *Id.* at 228 & n.1.) Second, as a result of two court-ordered resentencing proceedings, Nelson was for the Thompson murder alone sentenced to death three separate times by three different Alabama juries. *Id.* at 228; *Nelson v. Alabama*, 292 F.3d 1291, 1294 (11th Cir. 2002). Finally, and most importantly for present purposes, Nelson has filed and litigated to conclusion a federal habeas

corpus petition challenging his current death sentence. The district court denied Nelson's petition, the Eleventh Circuit affirmed, *see id.*, and on March 24, 2003, this Court denied certiorari, *Nelson v. Alabama*, 538 U.S. 926 (2003) - which brings us to the current proceeding.

As a preface, it should be noted that on July 1, 2002 - shortly after the Eleventh Circuit had affirmed the denial of habeas relief - the Alabama Legislature changed the State's method of execution from electrocution to lethal injection. Ala. Code § 15-18-82.1. In doing so, the Legislature provided every death-row inmate "one opportunity" to choose electrocution over lethal injection. *Id.* § 15-18-82.1(a), (b). Nelson waived the electrocution option by failing to exercise it timely. *Id.*

Following this Court's March 24, 2003, denial of certiorari on Nelson's habeas petition, the State on April 4, 2003, moved the Alabama Supreme Court to set Nelson's execution date. Shortly thereafter, counsel for the State received a letter from Nelson stating that his attorneys would not respond to the motion or "seek a stay of execution [on his] behalf." App. 89. Nelson requested that all possible steps be taken to ensure that an execution date was set expeditiously. *Id.* On September 3, the Alabama Supreme Court set Nelson's execution for October 9, 2003.

In the meantime, on August 19, 2003 - more than two weeks before the Alabama Supreme Court issued its order setting Nelson's execution and nearly *two months* before the scheduled execution date itself - counsel for Nelson wrote to Warden Culliver to explain that "Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins" as a result of years of illegal drug abuse. App. 25. Specifically, counsel referred to the possibility that a "'cutdown' procedure" might be used to carry out Nelson's lethal injection. App. 26.

In response to the August 19 letter, state medical personnel examined Nelson's veins. App. 93. On discovering that locating a vein in Nelson's lower arms might be problematic, Warden Culliver found a doctor who

could attach a direct IV line to a vein in another part of Nelson's body. App. 93-94. Specifically, the State's doctor proposed first "to attempt to connect a direct intravenous line to the femoral vein located in [Nelson's] thigh" and, failing that, to a vein in his neck. App. 93. A cut-down was "the last procedure" the doctor proposed to attempt, and only then if it "bec[a]me necessary." *Id.*

Although the August 19 letter shows that Nelson was aware of the bases for his Eighth Amendment claim at least seven weeks before his scheduled execution, Nelson waited until the afternoon of October 6, 2003 - three days before the execution date - to file his § 1983 complaint. App. 39. The next day, after conducting a conference call with counsel and receiving the parties' briefs, the district court dismissed Nelson's suit. App. 105. The district court determined that because Nelson's complaint "challenge[d] procedures closely related to his execution and s[ought] a stay of execution," it was the "functional equivalent" of a habeas corpus petition and, therefore, was subject "to the limits imposed on successive petitions in 28 U.S.C.A. § 2244." App. 110. The court held that "[b]ecause Nelson did not first apply to [the Eleventh Circuit] for approval to file a second habeas petition, [it] did not have jurisdiction to hear his claim." App. 112.

The Eleventh Circuit affirmed in a 2-1 decision. In likewise holding Nelson's complaint to be the "functional equivalent" of a successive habeas petition, the court of appeals emphasized that the complaint sought "an immediate stay to the imposition of [his] death sentence." App. 121. "Nelson's prayer to stay his execution," the court observed, "directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." App. 122-23 n. 4.

Nelson petitioned this Court for certiorari on two questions: first, as a procedural matter, whether the Eleventh Circuit erred in dismissing his § 1983 complaint as the "functional equivalent" of a successive habeas corpus

petition; and second, as a substantive matter, whether the use of a cut-down procedure as a means of administering an execution by lethal injection would violate the Eighth Amendment. Pet. i. This Court stayed Nelson's execution and subsequently granted Nelson's petition for certiorari, limited to the first question presented, which the Court reformulated as follows: "Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?" App. 132-33.

C. The Cut-Down Procedure

Before turning to the Question Presented, it is necessary to clear away some underbrush. As noted, this Court did *not* grant certiorari on the substantive question whether the use of a cut-down as a means of administering a lethal injection would violate the Eighth Amendment. Rather, the Court agreed to review only the procedural question whether § 1983 is an appropriate vehicle for Nelson's challenge. Accordingly, Nelson's dramatic descriptions of the cut-down procedure – as well as the lone *amicus* brief filed on his behalf, which addresses itself exclusively to the medical pros and cons of cut-downs – are irrelevant to this case. Nonetheless, because Nelson has misrepresented both (i) the specifics of the cut-down procedure itself and (ii) the likelihood that a cut-down will actually come to pass in his execution, a brief clarification of the record is in order.

1. For starters, to read Nelson's pleadings in this case, the challenged cut-down procedure is "barbaric" (App. 13; Pet. 16, 20, 33; Pet. Br. 31), "invasive" (App. 13; Pet. 16, 22, 23; Pet. Br. 30), "inhumane" (Pet. 22), "risky" (Pet. 22), and, with his emphasis, "**exceptionally** suspect" (Pet. 11). A cut-down, Nelson says, will entail the "mutilation" of his body (App. 13; Pet. 5; Pet. Reply 2, 3, 4, 5, 7, 8), involve "unnecessary pain and suffering" (App. 13; Pet. 16, 23), and risk "life-threatening" complications including "severe

hemorrhage," "cardiovascular collapse," "shock," and "terror" (Pet. 17). Indicative of Nelson's own hyperbole, Nelson's expert goes so far as to suggest that during any cut-down procedure, "smoke will rise from the area of incision" and "the room will smell of burning tissue, flesh, and blood." App. 32.[2]

Nelson's gory description of the cut-down procedure finds scant support in objective evidence. The scientific fact, as recognized by the sources on which Nelson's own *amici* principally rely, is that a venous cut-down is "a time-honored, simple surgical technique" and "an excellent method of obtaining venous access in several emergent clinical situations," S. Dronen & P. Lanter, *Venous Cutdown, in* Clinical Procedures in Emergency Medicine 341-42, 350 (J. Roberts & J. Hedges eds., 3d ed. 1998), and, further, "an effective option for venous access ... when peripheral cannulation becomes difficult or impossible," *Venous Cut Down: A Quicker and Safer Technique*, The Royal College of Surgeons, www.edu.rcsed.ac.uk/operations/op4.htm. As the State's affiants have testified (App. 91, 93), a cut-down procedure entails only "a small skin incision, after which a venectomy is made and a wide-bore plastic catheter is inserted into the vein and secured with sutures." *The Merck Manual of Diagnosis and Therapy* 1621 (17th ed. 1999). A cut-down typically takes "5 to 6 minutes to complete," requires only local anesthetic, and involves "minimal" bleeding. *See* Dronen & Lanter, *supra*, at 342, 345. As with any surgical procedure, "common complications" may arise, but they "can be reduced by catheter removal as soon as possible or frequent catheter replacement." *Merck Manual, supra*, at 1621. In any event, the sources cited by Nelson's own *amici* indicate that the complications that may attend a cut-down are no more serious than those associated with Nelson's

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[2] Our research indicates that in the last year alone, Nelson's expert, Dr. Heath, has testified in support of at least nine inmates challenging various aspects of seven different States' lethal-injection procedures.

preferred method of central venous access. *See* Royal College of Surgeons, *supra*.

Nelson's blood-and-guts portrayal also ignores that cut-downs are not reserved for use in executions; rather, as Nelson's *amici*'s source confirms, "[v]enous cut down is an emergency procedure that is potentially *life saving*." *Id.* (emphasis added); *see also* Br. for Sen. Orrin G. Hatch, *et al.*, as Amici Curiae at 6-7 (hereinafter "Hatch Br.") (cut-down used on "newborn infants" and "trauma patients"). A cut-down is no more "barbaric" in the present context than it would be in the event that Nelson – or for that matter, any patient in a public hospital – required a life-saving medical procedure and venous access could not otherwise be obtained. The cut-down procedure itself – which Nelson repeatedly insists is all he is challenging (*see infra* at 25) – is precisely the same in both circumstances.

2. Even more significant for present purposes than Nelson's misleading description of the cut-down procedure is his mischaracterization of the probability that a cut-down will even occur as part of his execution. From Nelson's pleadings, one would surmise that the State "in fact does intend to perform" a cut-down as a predicate to his execution. App. 13; *accord* App. 11; Pet. 15, 20, 35; Pet. Reply 6. Indeed, Nelson went so far in the lower courts to as to feature on the covers of his briefs a banner reading: "**Cut-down procedure expected to begin at approximately 4:00 p.m. central time.**" In this Court, Nelson continues to assert that the State is "adamant that [it] intends to implement an inhumane method for gaining venous access" (Pet. 22), that the State "insist[s] ... upon [its] chosen 'cut-down' technique for acquiring venous access" (Pet. Br. 35), and, further, that the State "will perform [a] cut-down procedure on [him] prior to his execution" (Pet. 24). In opposition to what he describes as the State's certain "barbari[sm]," Nelson proposes – seemingly reasonably – an "alternative procedure," called percutaneous central line placement, which he claims is "superior to the cut-down procedure in virtually all regards." App. 17; Pet. 20.

Contrary to Nelson's mischaracterizations, the record makes clear that it is highly "unlikely that [a cut-down] procedure will even become necessary" in Nelson's case. Br. in Opp. 2. Rather, as the Eleventh Circuit summarized:

> Alabama first proposes to gain venous access through a femoral vein in Nelson's thigh and if unsuccessful through the external carotid artery in Nelson's neck, neither of which procedure Nelson challenges. It is only if venous access cannot be readily gained in those two areas that Alabama proposes to use the third alternative of the "cut-down" procedure.

App. 120 n.3.

The State has consistently maintained that a cut-down "will only be considered as a last resort" – *i.e.*, only if the doctor responsible for connecting the intravenous line to Nelson is unable to obtain venous access through more conventional techniques. Br. in Opp. 2; *see also id.* at 22-23 ("[T]he sole basis for Nelson's eleventh hour claim, the 'cut-down' procedure, will most likely not even be utilized."); Supp. Br. in Opp. 7-8 n.3 ("last resort"). The record is clear on this point. In their affidavits, both Warden Culliver and Dr. Sonnier described the cut-down procedure as being the third of three options – one that will be utilized only if options one (a central line in the thigh) and two (a central line in the neck) fail and a cut-down becomes truly "necessary." App. 91, 93.

Thus, what the record in this case reveals is not that a cut-down is inevitable (or even likely) but, to the contrary, that the parties agree that conventional IV methods are preferable to the cut-down procedure and should be attempted before resorting to a cut-down. *Compare* App. 37-38 (Heath) *with* App. 90-91 (Sonnier) and App. 93-94 (Culliver). On the understanding that Nelson's years of illegal IV drug abuse have foreclosed the possibility of a simple, superficial needle stick in the lower arm, the State has proposed first to seek venous access by "attach[ing] the

IV to the femoral vein located in the upper thigh." App. 90. Nelson's expert apparently concurs in that approach. After reviewing the Sonnier and Culliver affidavits describing the State's plans, Dr. Heath testified that given Nelson's history of illegal IV drug abuse and the apparent absence of peripheral veins in Nelson's arms, it is "highly likely" that the State will be required to "place a central line" into a deep vein such as "the femoral vein (in the groin) ...." App. 98.[3]

Thus, to be clear, all agree that conventional IV methods - initially, a central line placement in the femoral vein - are preferable to and should be attempted before the cut-down procedure. And there is no particular reason to believe that conventional venous access through the femoral vein in the thigh (or failing that, the neck) will not succeed; the record indicates only that Nelson does "not have any veins *in his lower arms and hands* sufficient to support a direct intravenous line." Pet. Br. 6 n.4 (quoting App. 93) (emphasis added). A cut-down will be implemented only "as a last resort" in the unlikely event that conventional IV techniques do not provide venous access.

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[3] Nelson makes much (Pet. Br. 9-10) of a mistaken reference in Dr. Sonnier's affidavit to the "external carotid vein located in the neck." Notably, however, Nelson's own expert, Dr. Heath, readily recognized that Dr. Sonnier meant to refer to the "external jugular vein," which Heath acknowledged to be a "commonly-used structure for obtaining intravenous access if peripheral access cannot be secured." App. 99.

Contrary to Nelson's suggestion, all Dr. Sonnier's mistake proves is that his affidavit was hastily prepared - a circumstance that is wholly the result of Nelson's own eleventh-hour filing. Indeed, even Dr. Heath - who regularly testifies on behalf of condemned inmates (*see supra* at 7 n.2) - arguably misstepped in executing his affidavit. Heath testified that a cut-down - which (at least as envisioned here) is used to administer IV drugs where standard IV techniques will not work - should typically be "performed under deep sedation that includes the administration *of potent intravenous analgesics* ...." App. 32 (emphasis added). It is not immediately apparent how one would administer "intravenous analgesics" as a means of sedating a cut-down patient given that the sole reason for employing a cut-down is that conventional intravenous access is impossible. Conspicuously, Nelson's brief to this Court ellipsizes the "intravenous analgesics" portion of Dr. Heath's statement. *See* Pet. Br. 10.

SUMMARY OF ARGUMENT

By his own admission, Nelson filed his eleventh-hour stay request in the guise of a § 1983 complaint for only one reason: not because § 1983 is the appropriate vehicle for his challenge but, rather, because he "ascertained" that binding law "foreclosed any access to habeas corpus relief." Nelson's suit is an end-run, plain and simple.

1. Several explicit restrictions on habeas corpus practice would have precluded Nelson from attacking the imposition of his death sentence in a habeas petition. Most obviously, having already fully litigated one habeas challenge to his death sentence, any effort by Nelson to obtain habeas relief would have run squarely into AEDPA's virtual bar on successive petitions. As relevant here, the only exception to that bar permits a successive petition raising a new claim that *both* (i) depends on a "factual predicate" that could not have been discovered earlier *and* (ii) implicates the inmate's actual, factual innocence. 28 U.S.C. § 2244(b)(2). As Nelson's lawyers have acknowledged that Nelson's claim "does not have anything to do with factual innocence," AEDPA's bar expressly applies and prohibits Nelson from pursuing habeas relief. In any event, even aside from AEDPA's successive-petitions bar, any habeas petition filed by Nelson would have been dismissed for failure to exhaust, 28 U.S.C. § 2254(b), and as barred by *Teague v. Lane*, 489 U.S. 288 (1989).

2a-b. Nelson cannot skirt Congress' specific limitations on habeas relief by what this Court has called "the simple expedient of putting a different label on [his] pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). Section 1983 simply is not an appropriate vehicle for Nelson's Eighth Amendment claim. *Preiser*, which deals expressly with actions, like Nelson's, seeking injunctive relief from state convictions or sentences, makes clear that an inmate may not "challeng[e]" or "attack" his sentence in a § 1983 action. Given that (i) obtaining venous access is, in Nelson's own words, a "condition precedent" to his execution, and (ii) the cut-down procedure that Nelson challenges will be utilized

only if other means of venous access fail and a cut-down becomes truly "necessary," it is clear that Nelson's challenge to the use of a cut-down constitutes a forbidden "challeng[e]" to the imposition of his sentence within the meaning of *Preiser*. For the same reasons, even if the governing precedent here were not *Preiser* but, instead, *Heck v. Humphrey*, 512 U.S. 477 (1994) – which dealt specifically with § 1983 *damages* actions – Nelson's suit would be barred because in every real and meaningful sense Nelson's challenge to the use of a cut-down "necessarily impl[ies] the invalidity of his … sentence." *Id.* at 487.

2c. In seeking habeas-like relief from the imposition of his death-sentence in what is nominally a § 1983 complaint, Nelson is effectively asking this Court to engraft a new exception onto AEDPA's successive-petitions bar. Nelson's suit is completely unmoored from – and, indeed, would gut – AEDPA's plain language and manifest purpose.

3. Even assuming that Nelson's claim itself does not take his suit outside § 1983's ambit, the specific relief he seeks – a stay of his impending execution – does so. Because a request for a stay of execution entails a federal interference with state penal interests at least as grave – if not more so – than the request for speedier release at issue in *Preiser*, federal courts may not stay impending executions under § 1983. Nelson had ample time in which to litigate his challenge to the possible use of a cut-down without seeking a stay. Instead of promptly pursuing his claim, he waited until the last minute to spring his challenge on the State and the courts. Nelson's sandbagging should not be rewarded.

4. Wholly apart from the question whether Nelson's claim and requested relief are cognizable under § 1983, equitable considerations require dismissal. Under *Gomez v. United States District Court*, 503 U.S. 653 (1992), "[w]hether [Nelson's] claim was framed as a habeas petition or a § 1983 action," his suit should be dismissed because (i) a quarter century after Nelson's crime, the State has a "strong interest in proceeding with its judgment"; (ii) there is "no good reason for [Nelson's] abusive delay" in filing; and (iii) by

waiting until the eleventh hour Nelson has plainly engaged in "last-minute attempts to manipulate the judicial process." *Id.* at 654.

5. Nelson's assertion that if not allowed to proceed under § 1983 he will be without "any remedy" is misleading and factually inaccurate. Nelson had – and still has – multiple viable remedies open to him, including at least one in this Court directly (an original writ), and several more in state court with subsequent § 1257 review in this Court. To the extent that Nelson's contention is that he has an absolute right to litigate his claim in a lower federal court, this Court has squarely – and repeatedly – rejected it.

ARGUMENT

There is a simple – and transparent – explanation for Nelson's decision to file his last-minute stay request in a § 1983 complaint rather than a habeas corpus petition. That explanation is *not* that § 1983 is the more appropriate vehicle for Nelson's Eighth Amendment challenge. Rather, as Nelson concedes in his brief, he filed a § 1983 action because he "ascertained" that binding law "foreclosed any access to habeas corpus relief." Pet. Br. 29. Nelson's suit, therefore, is nothing more and nothing less than "an effort to accomplish via § 1983 what cannot be accomplished by a successive petition for habeas corpus." App. 123 n.4. Nelson's suit, by his own admission, is an end-run.

This Court has never suggested that § 1983 exists to fill perceived "gaps" in the habeas statute's remedial scheme. Rather, habeas corpus and § 1983 are distinct remedies that address distinct situations. This Court's decisions uniformly differentiate habeas petitions from § 1983 complaints on the substantive bases of (i) the claims raised and (ii) the relief sought. Some claims and forms of relief are exclusively the province of habeas; others are appropriately the subject of § 1983. Nelson nowhere contends that the claim he raises and the relief he seeks are inappropriate to habeas, and he only glancingly suggests that his claim and requested relief are truly appropriate to § 1983. Nelson's principal position,

instead, is that because habeas corpus does not provide him relief, § 1983 must. That is not the law. A nonactionable habeas claim does not, simply by virtue of its nonactionability, become a § 1983 claim.

I. Nelson Could Not Have Obtained Relief on His Eighth Amendment Claim in a Federal Habeas Corpus Petition.

Nelson, by his own admission, filed under § 1983 not because it is an appropriate vehicle for the claim he raises or the relief he seeks – it is not – but rather because Congress and this Court have on multiple bases clearly foreclosed habeas corpus relief to inmates in Nelson's position.

A. A Federal Habeas Petition Presenting Nelson's Claim Would Have Been Barred as Successive.

Having already litigated one habeas corpus petition challenging his death sentence, the first and most obvious impediment to habeas relief that Nelson faced was AEDPA's virtual ban on "second or successive habeas corpus application[s]," 28 U.S.C. § 2244(b). As this Court observed just last Term, "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, *particularly in capital cases*." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.), 404 (O'Connor, J., for the Court), and *Williams v. Taylor*, 529 U.S. 420, 436 (2000)) (emphasis added). Specifically, Congress sought "to curb the abuse of the statutory writ of habeas corpus" and, thereby, to "address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944; *accord* 142 Cong. Rec. S3465 (Apr. 17, 1996) (Sen. Warner) (purpose to stop "the charade of habeas corpus appeals" and to preclude "death row inmates [from] drag[ging] out their appeals for several decades"). In signing AEDPA, President Clinton lamented that "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served." Statement on Signing the Antiterrorism and Effective Death

Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996). The point of AEDPA, the President emphasized, was to "streamline Federal appeals for convicted criminals sentenced to the death penalty." *Id.*

One of the principal means by which Congress sought to "streamline" the appeals process was by severely restricting inmates' ability to file "second or successive" habeas petitions. 28 U.S.C. § 2244(b). Section 2244(b)(1) requires dismissal, without exception, of any claim raised in a second or successive petition that "was presented in a prior application." With respect to so-called "new claim" petitions – second or successive petitions raising claims, like Nelson's Eighth Amendment claim here, that were "*not* presented in a previous application" – § 2244(b)(2) requires dismissal save in two narrow circumstances. Specifically, Congress determined that an inmate may file a new-claim successive petition only:

- where the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (§ 2244(b)(2)(A)); or
- where *both* (i) the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* (ii) the facts underlying the claim establish by clear and convincing evidence that the prisoner is actually, factually innocent "of the underlying offense" (§ 2244(b)(2)(B)).

One of Nelson's own lawyers, Mr. Stevenson, has in his academic writings accurately described the changes wrought by AEDPA's stringent successive-petitions bar. "As a general matter" in the pre-AEDPA days, "any type of claim that was unavailable at the time of the earlier filing – because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner – was an appropriate candidate for inclusion in a successive petition." B. Stevenson, *The Politics of Fear and Death: Successive*

Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 736 (2002). "AEDPA's successive petition standard," Stevenson explains, "appears to incorporate this general approach, but with one major difference." *Id.* at 737. Specifically, and as particularly relevant here, "Subsection 2244(b)(2)(B)(ii) sharply diverges from the prior law ... by modifying the 'new facts' category to include an additional requirement that the prisoner make a showing of 'innocence.'" *Id.* at 737-38.[4] Stevenson goes on to explain (again correctly) that § 2244(b)(2)(B)(ii)'s standard "is not elastic enough to include certain capital punishment claims" – like Nelson's here – "that concern the constitutionality of an execution as opposed to the constitutionality of the capital sentencing determination." *Id.* at 740.[5]

Consistent with this understanding, Nelson's lawyers have conceded that Nelson's Eighth Amendment claim does not fit within AEDPA's narrow exceptions. In view of the fact that Alabama did not adopt lethal injection as its method of execution until July 2002, after Nelson's first habeas petition had been adjudicated, the district court pointedly asked Nelson's lawyer whether Nelson's claim "couldn't arguably ... fall under a factual predicate that wasn't discovered earlier" within the meaning of § 2244(b)(2)(B). App. 69. Presumably alluding to the change in execution method, counsel responded that "[o]bviously, the factual predicate for this case was not available to Mr. Nelson until very recently." App. at 69-70. But, referring to § 2244(b)(2)(B)'s actual-innocence prong, counsel correctly added that "[t]he problem is, I don't think that's the only part of the standard" and admitted that "*obviously ... our*

[4] *See also* R. Hertz & J. Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 28.3e, at 1318 (4th ed. 2001) (explaining AEDPA's shift from disjunctive cause-or-innocence standard to conjunctive "cause and innocence" standard); H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 250 (R. Fallon, *et al.*, eds., 2002 Supp.) (AEDPA changes prior law such that claim must "satisfy both conditions").

[5] *Accord* Hertz & Liebman, *supra*, § 28.3e, at 1321.

claim does not have anything to do with factual innocence." *Id.* (emphasis added). Accordingly, it is common ground in this case that because "an execution-related claim" – like Nelson's – "does not qualify for the innocence requirement of § 2244(b)(2)(B)," *see* Stevenson, *supra*, at 756, AEDPA's successive-petitions bar would have precluded Nelson from pursuing his Eighth Amendment challenge to Alabama's lethal-injection procedures in a habeas corpus petition.

B. Nelson's Belated Contention That His Claim Should Not Be Considered Successive Is Meritless.

In his brief to this Court, Nelson attempts an about-face. Despite his concession, noted by the lower courts, "that he had exhausted all available habeas corpus relief and that he would have to get permission from the Eleventh Circuit in order to file a second or successive habeas petition" (App. 119-20 n.2), Nelson now contends that his claim should *not* be considered successive, for two reasons.

1. As an initial matter, Nelson repeatedly asserts that this Court in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), "held specifically that a lawsuit limited to claims arising for the first time out of the circumstances of a death-sentenced inmate's imminent execution – claims that were premature and unfit for adjudication until just before the execution is carried out – does not constitute a 'second or successive' habeas corpus application for purposes of § 2244(b) when it is filed after the denial of habeas corpus relief on an earlier petition challenging the underlying conviction and sentence." Pet. Br. 15; *see also id.* at 23, 25, 28, 36-37.

Nelson is wrong; his argument is based on either a misunderstanding or a mischaracterization of the decision in *Martinez-Villareal*. At issue there was a habeas petition presenting a "competency-to-be-executed" claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). The condemned inmate had raised his *Ford* claim in a prior habeas petition, but the district court had "dismissed [the claim] as premature ... because his execution was not imminent and therefore his competence to be executed could not be determined at that

time." *Martinez-Villareal*, 523 U.S. at 644-45. After the State had obtained an execution warrant, the inmate moved the district court to reopen his earlier-filed *Ford* claim. Based on AEDPA's successive-petitions bar, the district court refused. The Ninth Circuit reversed, seemingly on the broad ground that because, almost by definition, a *Ford* claim will not arise until after the first round of habeas litigation, AEDPA's successive-petitions bar "does not apply to a petition that raises only a competency to be executed claim." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 629 (9th Cir. 1997).

This Court affirmed but, as Nelson's counsel has correctly observed elsewhere, "on a much narrower ground than the appellate court had employed." Stevenson, *supra*, at 744. Whereas "the Ninth Circuit [had] essentially read into the statute an exemption for *Ford* claims," this Court "avoided deciding the broad issues in the case." *Id.* at 742, 747. This Court held only that the inmate there had not filed a "second or successive" habeas petition at all but, instead, had simply moved to reopen his *first* petition. *See Martinez-Villareal*, 523 U.S. at 643 ("There was only one application for habeas relief ...."). The Court concluded that in that unique situation, where a habeas petitioner moves to reopen an earlier-filed petition to obtain an initial merits determination of a previously-unripe claim, AEDPA posed no bar. The Court expressly did *not* adopt a broad-ranging exception to § 2244(b)'s successive-petitions bar for all claims that, for whatever reason, could not have been raised in a first petition. *See id.* at 645 n.*. Nelson's repeated suggestion to the contrary is mistaken – and given his own counsel's evident understanding of *Martinez-Villareal*'s "narrow" holding (*see* Stevenson, *supra*, at 742-48), disingenuous.

Neither *Martinez-Villareal* nor its successor, *Slack v. McDaniel*, 529 U.S. 473 (2000), can be stretched to encompass Nelson's case. As noted, the numerically second petition in *Martinez-Villareal* was deemed a first petition because the petitioner there had moved to reopen a previously-filed claim. In *Slack*, a numerically second petition was deemed a first only because the actual first petition had been dismissed

on exhaustion grounds and, thus, could be treated "as though it had not been filed." 529 U.S. at 488. Neither special circumstance would have obtained here. Nelson would not have been moving to reopen an earlier-filed claim; and because his first petition was denied on the merits, not for failure to exhaust or for some other technical deficiency, it could hardly have been deemed a non-event. There simply is no amount of massaging that could have made Nelson's petition (had he filed one) anything other than "second or successive."

2. Nelson's brief next suggests (albeit obliquely) that Congress could not possibly have intended to preclude successive habeas petitions like his – petitions raising new claims that, though not implicating actual innocence, are based on facts not available at the time the first habeas petition was adjudicated. Pet. Br. 22-23. But as AEDPA's plain language demonstrates, that is *precisely* what Congress intended. Again, before AEDPA, a new claim could be presented in a successive petition on a showing *either* (i) that the factual basis for the claim was not available at the time the first petition was filed *or* (ii) that the petitioner was likely to be innocent. *See* Hertz & Liebman, *supra* note 4, § 28.3e, at 1318 (citing *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991)). Section 2244(b)(2)(B), as amended by AEDPA, clearly represents Congress' conscious design to tighten the successive-petition standard by requiring a showing of *both* (i) a newly-discovered factual predicate *and* (ii) probable actual innocence. *See id.* ("cause and innocence"); Hart & Wechsler, *supra* note 4, at 250 ("both conditions"). *See generally* Hatch Br. 2, 17-21.

Congress' determination to limit § 2244(b)(2)(B)'s reach to claims that (unlike Nelson's) implicate an inmate's actual innocence is not only crystal clear, but also eminently reasonable. It appropriately tempers the traditional habeas concerns of federalism, comity, and finality with a heightened solicitude for one uniquely compelling circumstance: an inmate's showing that he is actually, factually innocent – *i.e.*, that he didn't do it. *See Schlup v.*

Delo, 513 U.S. 298, 324-25 (1995) ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence."); *see also Calderon v. Thompson*, 523 U.S. 538, 558 (1998) ("AEDPA's central concern" is "that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.").

* * *

This Court has recognized "that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). This Court has also held that § 2244(b)(2)'s "added restrictions" on new-claim successive petitions are "well within the compass" of the "complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions" and, accordingly, do not implicate the Suspension Clause. *Id.* Given the evident care with which Congress crafted § 2244(b)(2)(B)'s exception - specifically (and reasonably) defining it to apply only to claims concerning a prisoner's actual innocence - this Court should refuse Nelson's end-run, which, as one of his own lawyers has acknowledged, is wholly "unmoored in the language" of § 2244(b) (Stevenson, *supra*, at 781) and, indeed, reads the actual-innocence limitation right out of the statute.

C. Even If It Were Not Barred as Successive, Nelson's Claim Could Not Have Been Presented in a Federal Habeas Petition.

Even aside from AEDPA's successive-petitions bar, Nelson would have faced at least two additional obstacles to filing a federal habeas petition challenging the imposition of his death sentence. First, as the State has emphasized throughout these proceedings, Nelson has made no effort whatsoever to exhaust his state remedies. *See* 28 U.S.C. § 2254(c) (inmate must exhaust "any available procedure" for raising his claim in state court). Nelson's failure is not excused by the fact that his claim arose after direct appeal. Where, as here, "state post-conviction processes are open to

a claim not previously raised in state court ... exhaustion of those processes is required." Hart & Wechsler, *supra* note 4, at 1446.

Second, the claims Nelson raises here - not only his challenge to the cut-down procedure itself but also his demand to know the particulars of the State's lethal-injection "protocol," the identities and credentials of the persons performing execution procedures, and the setting in which those procedures will be performed - are in all likelihood barred by *Teague v. Lane*, 489 U.S. 288 (1989). As support for his various claims, Nelson cites only stock language from this Court's decisions in *Louisiana v. Resweber*, 329 U.S. 459 (1947), *Trop v. Dulles*, 356 U.S. 86 (1958), *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994). There is no sense in which a favorable resolution of Nelson's claims is "*dictated* by" any of those decisions or by any other "precedent existing at the time [his] conviction became final." *Teague*, 489 U.S. at 301.

* * *

Correctly "ascertain[ing]" that existing law "foreclosed any access to habeas corpus relief" (Pet. Br. 29), Nelson filed what was nominally a § 1983 complaint. But Nelson's "Complaint" bears all of the hallmarks of a habeas corpus petition and, accordingly, constitutes "an obvious attempt to avoid application" of the various restrictions on federal habeas practice. *Gomez v. United States District Court*, 503 U.S. 653, 653 (1992). Nelson's pleading seeks purely equitable relief, is directed to state officers in their official capacities, and, indeed, expressly names Warden Culliver as a defendant. Most importantly, as detailed below, Nelson's pleading expressly and directly challenges the imposition of his criminal sentence - by seeking "an order granting injunctive relief and staying [his] execution" (App. 22) - and thus falls squarely within the rule of *Preiser v. Rodriguez* that an inmate challenging his sentence in federal court "is limited to habeas corpus" and may not sue under § 1983. 411 U.S. 475, 489 (1973).

II. The Claim Nelson Presents Is Not Cognizable Under Section 1983.

Nelson describes the State's position here (as well as the Eleventh Circuit's holding) as categorically barring a "death-sentenced inmate[] who ha[s] filed a federal habeas corpus petition ... from bringing *any* § 1983 action that could be brought by other inmates." Pet. 25 (emphasis added); *see also id.* at 26 ("any actions"); *id.* at 27 ("all § 1983 claims"); Pet. Br. 20 ("any federal action"). Thus, Nelson warns, unless he prevails, condemned inmates who have filed federal habeas petitions will be forever precluded from bringing § 1983 actions challenging, for instance, "the malicious and sadistic infliction of harm by prison guards," "denial[s] of medical care," and "denial[s] of the minimal civilized nature of life's necessities." Pet. 25.

Nelson is wrong; he attacks the proverbial straw man. The State has never contended, and the Eleventh Circuit never held, that a condemned inmate who has filed a federal habeas petition is thereafter categorically barred from filing suit under § 1983. Nelson quotes the Eleventh Circuit as having held "that '*a § 1983 claim* is subject to the procedural requirements for bringing a second or successive habeas claim.'" Pet. 26 (quoting *Spivey v. Board of Pardons & Paroles*, 279 F.3d 1301, 1302 (11th Cir. 2002)) (emphasis added). Nelson's quotation, however, conspicuously omits an important limitation on the scope of the Eleventh Circuit's rule. What the *Spivey* court actually held – and all the State contends here – is "that a '§ 1983 claim *[challenging the legality of an execution]* is subject to the procedural requirements for bringing a second or successive habeas claim.'" 279 F.3d at 1302 (emphasis added).

State prisoners in Nelson's shoes – *i.e.*, those who have previously filed federal habeas petitions – may of course file § 1983 complaints challenging the conditions of their confinement. Indeed, this Court observed in *Preiser v. Rodriguez* that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life." 411 U.S. at 499. What a state

prisoner may *not* do is dress up in § 1983 garb what is in substance a habeas petition – a pleading expressly seeking equitable relief from a conviction or sentence – in an attempt to skirt the various restrictions on habeas practice. On that score, this Court made two important observations in *Preiser*: first, that "a state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus"; and second, that an inmate may not circumvent applicable habeas restrictions "by the simple expedient of putting a different label on [his] pleadings." *Id.* at 489-90. As explained below, that is exactly what Nelson tried to do here.

A. Nelson's Claim Is Not Cognizable Under Section 1983 Because It Directly Challenges the Imposition of His Death Sentence.

1. Under *Preiser v. Rodriguez*, a Claim That Challenges a Criminal Sentence Is Not Cognizable Under Section 1983.

Nelson's position is, as it must be, that "Section 1983 is an appropriate vehicle for [his] claims." Pet. Br. 30. The principal basis for that position seems to be § 1983's broad language, which authorizes "suit[s] in equity" against state actors who deprive citizens "of any rights, privileges, or immunities secured by the Constitution." *Preiser v. Rodriguez*, however, makes clear that the fact that "[t]he broad language of § 1983" covers a prisoner-plaintiff's request for equitable relief is "not conclusive." 411 U.S. at 489. Rather, "despite the literal applicability of [§ 1983's] terms," the "specific federal habeas corpus statute" is the exclusive remedy where it "clearly applies." *Id.*; *see also Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) ("In the manner of [*Preiser*], I read the 'general' § 1983 statute in light of the 'specific' federal habeas statute ....").

To the end of giving the "specific" habeas statute its intended scope and effect, the *Preiser* Court embraced the uncontroversial proposition that a state prisoner who "challeng[es]" or "attack[s]" his criminal sentence on

constitutional grounds in a federal court and seeks equitable relief from that sentence, *see* 411 U.S. at 484, 489, 494, 498, 499, "is limited to habeas corpus" and may not pursue his challenge via § 1983, *id.* at 489. Indeed, even the *Preiser* dissenters seemed to agree that the habeas statute would – at the very least – govern a case involving an "attack ... directed at a state court conviction or sentence." *Id.* at 520 (Brennan, J., dissenting). More recently, in addressing a claim similar to Nelson's, this Court in *Lonchar v. Thomas* reiterated that the various restrictions on habeas practice "apply to a suit challenging the method of execution, regardless of the technical form of action." 517 U.S. at 329 (citing *Gomez v. United States District Court*, 503 U.S. 653).

In the light of (and typically citing) *Preiser* and its progeny, every court of appeals squarely to consider the issue has held that a condemned inmate challenging the imposition of his death sentence must proceed via habeas, not § 1983. *See, e.g., Buchanan v. Gilmore*, 139 F.3d 982, 984 (4th Cir. 1998); *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 420-21 (5th Cir. 2002); *In re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997); *Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997); *Fugate v. Department of Corr.*, 301 F.3d 1287, 1288 (11th Cir. 2002).[6]

Accordingly, inasmuch as Nelson's claim for injunctive relief in this case constitutes a "challeng[e]" to or "attack[]" on his death sentence, *Preiser* controls and prohibits the claim from proceeding under § 1983.

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[6] None of the decisions cited in Nelson's petition actually addresses the question whether *Preiser*-like concerns prevent an inmate's challenge to the imposition of his death sentence from proceeding under § 1983. *See* Supp. Br. in Opp. 2-6 (explaining *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000), *Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998), and *Wilson v. United States District Court*, 161 F.3d 1185 (9th Cir. 1998)).

2. By Challenging a Procedure That Is a "Condition Precedent" to the Imposition of His Death Sentence, Nelson Challenges the Sentence Itself.

Nelson seeks to avoid *Preiser* on two bases. First, he contends that, by definition, "§ 1983 cases do not challenge the conviction or sentence." Pet. 26. That argument is baseless. Indeed, it is precisely the argument that this Court rejected in *Preiser*, namely, that state prisoners may "evade [habeas] requirement[s] by the simple expedient of putting a different label on their pleadings." 411 U.S. at 489-90. Both *Preiser* and *Lonchar* make clear that it is a suit's substance, not its form, that determines its characterization as a § 1983 complaint or a habeas petition. *See Lonchar*, 517 U.S. at 329; *Preiser*, 411 U.S. at 489-90. To be sure, there are § 1983 claims – complaints about unsanitary living conditions, for instance – that do not entail challenges to criminal sentences. But just as surely there are those – like Nelson's – that *do* challenge criminal sentences and, accordingly, are subject to the restrictions on habeas corpus practice.

Nelson's second contention is that, even if a § 1983 action could be used to attack a state-imposed sentence, *his* § 1983 action does not. Specifically, Nelson says that his suit does not attack lethal injection *per se*, but instead merely challenges the constitutionality of a separate medical procedure. *See* Pet. Br. 9, 13, 15, 22, 29, 32, 33-35. Nelson's argument does not withstand scrutiny. As a baseline for evaluating Nelson's position, he has acknowledged that a "chemical composition challenge" – that is, a "challenge to the chemicals used for lethal injection" – "constitutes a challenge to a sentence of death by lethal injection" that must proceed via habeas, not § 1983. Supp. Cert. Reply 6. Nelson's concession is well-founded; this Court has recently refused stays of execution in a slew of cases in which death-sentenced inmates had presented chemical-composition claims in what were nominally § 1983 complaints. *See Robinson v. Crosby*, 124 S. Ct. 1196 (2004); *Roe v. Taft*, 124 S. Ct. 1196 (2004); *Zimmerman v. Johnson*, 124 S. Ct. 1168 (2004);

Bruce v. Dretke, 124 S. Ct. 1142 (2004); *Williams v. Taft*, 124 S. Ct. 1142 (2004); *Ward v. Darks*, 124 S. Ct. 1142 (2004); *Beck v. Rowsey*, 124 S. Ct. 980 (2004); *Zimmerman v. Johnson*, 124 S. Ct. 979 (2003). *See also Lonchar*, 517 U.S. at 329 ("method of execution" claim must proceed on habeas, not via § 1983).

Nelson seeks to distinguish his claim from the chemical-composition cases on the ground that his "challenge is to [the cut-down] medical procedure and not to the sentence of death." Supp. Cert. Reply 6. But as Justice Stevens has correctly pointed out, the "procedural issue" whether a prisoner's claim is cognizable under § 1983, or must instead proceed via habeas, is "precise[ly]" the same in the chemical-composition and cut-down contexts. *See Zimmerman*, No. 03A497, 540 U.S. __ (Dec. 15, 2003) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting). In any event, as explained below, the razor-fine distinction that Nelson posits cannot be squared with either (i) the premise underlying the Question Presented, as reformulated by this Court, (ii) Nelson's own pleadings in this litigation, or (iii) most importantly, the real-world facts.

1. In his petition, Nelson framed the first of his two questions presented as follows: "Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. § 1983, *which does not attack a conviction or sentence*, is - simply because the person is under a sentence of death - to be treated as a habeas corpus case subject to the restriction on successive petitions ....?" Pet. i (emphasis added). Plainly, the premise underlying Nelson's question presented was that his was *not* a challenge to the imposition of his death-sentence. In granting certiorari, this Court indicated a different view. Specifically, this Court reformulated the Question Presented, seemingly on the assumption that Nelson's claim *does* challenge the imposition of his sentence. As framed by this Court, the Question Presented asks "[w]hether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a *challenge to the procedures for carrying out the execution*, is properly recharacterized as a

habeas corpus petition under 28 U.S.C. Sec. 2254?" App. 132-33 (emphasis added). Thus, the reformulated Question Presented does not, as Nelson continues to suggest even in his merits brief, ask generically "whether a death row inmate's § 1983 action should be treated as a habeas corpus petition subject to the procedures required for filing successive petitions ...." Pet. Br. 13. Rather, it asks only whether habeas treatment is appropriate for a § 1983 complaint that seeks to "pursue a challenge to the procedures for carrying out the execution."

2. Nelson's suggestion that his § 1983 suit challenges something other than the imposition of his death sentence is also belied by his own pleadings, which demonstrate that it is *precisely* the imposition of his death sentence he is challenging. Nelson's complaint, for instance, refers to cut-downs (as well as other, preferable preparatory techniques) as "procedures employed *in the execution process*" (App. 16) (emphasis added), and asserts that the use of a cut-down will entail "unnecessary pain and suffering *in administering the punishment of lethal injection* to [him]" App. 20 (emphasis added). More to the point, Nelson has consistently (and correctly) represented that a medical procedure - whether cut-down or other - "**necessarily must be performed on [him] as a predicate to the legal procedure of execution ....**" Pet. 14 (boldface in original).[7] Indeed, in response to the district court's pointed question how one could "separate [the cut-down] procedure from the execution" itself, Nelson's attorney responded that, while the procedure and the execution are not exactly "one and the same," the procedure is "certainly ... a *condition precedent* of the lethal injection." App. 68 (emphasis added). Nelson's own pleadings thus demonstrate that his challenge is indeed to the imposition of his death sentence.

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[7] *Accord, e.g.*, App. 11 ("predicate"), 11 ("predicate"), 12 ("necessary"), 16 ("predicate"), 30 ("require[d]"); Pet. at 12 ("necessary"), 21 ("predicate"), 32 ("predicate"), 33 ("predicate").

3. Nelson's own characterizations of the preparatory procedure (whether cut-down or other) as "necessar[y]" to, a "predicate" to, and a "condition precedent" to his execution by lethal injection are not just consistent, they are accurate as a factual matter. It goes without saying that the State "will have to" perform some preparatory procedure "in order to be in a position to carry out the sentence of death by lethal injection." Supp. Cert. Reply 6. The State cannot carry out an execution by lethal injection - the only means of capital punishment available to Nelson[8] - without first preparing the condemned prisoner in some fashion, whether by a superficial IV stick, by the insertion of a central line, or, if all else fails, through the use of a cut-down. *See, e.g.*, App. 30 (Heath), 90-91 (Sonnier), 93-94 (Culliver), 99-100 (Heath). A preparatory medical procedure, therefore, is an integral component of - a necessary step in - the State's execution process. The procedure and the lethal injection itself are inseparable. A challenge to the former is necessarily a challenge to the latter.

Given that the State cannot proceed with Nelson's execution in the absence of some preparatory medical procedure - and, should it become necessary, a cut-down - it is plain that Nelson's challenge to the possible use of a cut-down constitutes an attack on the imposition of his sentence. Nelson's contrary argument rests on pure formalism, and has no footing in reality. Nelson's challenge to the cut-down procedure bears no meaningful similarity to a garden-variety conditions-of-confinement claim - concerning, say, unsanitary living quarters or a guard's mistreatment. Such a claim has no necessary effect on the imposition of a criminal sentence. By contrast, Nelson's claim challenges a procedure that is, by his own admission, a "condition precedent of the lethal injection" itself. Nelson's claim thus necessarily interferes with the imposition of his sentence.

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[8] *See* Ala. Code 15-18-82.1 (changing method of execution to lethal injection and giving inmates "one opportunity," which Nelson failed to exercise, to choose death by electrocution).

In the teeth of this common-sense logic, Nelson asks this Court to draw a line between challenges to an execution *per se*, which he concedes must be raised on habeas, and all other claims, which he says may proceed under § 1983. Thus, for instance, Nelson concedes that a chemical-composition claim "constitutes a challenge to a sentence of death by lethal injection" that must be pursued on habeas. Supp. Cert. Reply 6. It follows, presumably, that a claim that lethal injection itself is unconstitutional must also in Nelson's view proceed on habeas. *Accord, e.g., In re Sapp*, 118 F.3d at 461; *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997). But, Nelson says, because his challenge is not technically to the execution itself, but instead to a necessary preparatory procedure, it is exempt from the restrictions on habeas practice and may proceed unencumbered under § 1983. Nelson is wrong.

In distinguishing bona fide § 1983 claims from habeas claims, line-drawing is required, to be sure. But the line Nelson would have this Court draw is formalistic and, worse, illogical. It leaves a gaping hole in - to the point of rendering virtually meaningless - the restrictions that Congress and this Court have specifically imposed on habeas corpus practice. An inmate who cannot file a viable habeas challenge to his death sentence *per se* - because his petition is successive, because he has not exhausted state remedies, etc. - will simply recast his claim as one challenging a preparatory procedure and slap a § 1983 label on it. Rather, for instance, than arguing forthrightly on habeas that his death sentence should be set aside or frontally attacking electrocution as a means of execution, he will challenge via § 1983 the use of arm and leg restraints as a means of securing him to the chair. Rather than filing a habeas petition attacking the constitutionality of lethal injection or challenging the particular cocktail of chemicals used in the injection, he will sue under § 1983 disputing the use of a gurney, a cut-down, or, perhaps, even a needle.

These are not idle concerns; Nelson's slope is a slippery one. Indeed, this Court recently confronted a § 1983-based

stay request in which a condemned inmate facing lethal injection relied on Nelson's case to challenge as "invasive" and "mutilat[ing]" the use of a "central line" – *the very procedure Nelson offers as an acceptable alternative to a cut-down. See* Pet. for Cert. 16, *Robinson v. Crosby*, No. 03-8673, *cert. denied*, 124 S. Ct. 1196 (2004). The point is that a challenge to a procedure – whether a cut-down, a central line, or an IV stick – that is by all accounts a "condition precedent" to an execution will, if successful, yield precisely the same relief as would a frontal attack on the execution itself – inevitably the delay, and quite possibly the prevention, of that execution.

There is a better, more defensible line distinguishing habeas corpus petitions from bona fide § 1983 complaints in the unique context of capital sentencing. It is common ground here that challenges to death sentences *per se* (*e.g.*, method-of-execution, chemical-composition) are on the habeas side of the line. Also on the habeas side are challenges, like Nelson's, to acts or procedures that are necessary predicates or, in his words, "condition[s] precedent," to the imposition of a death sentence. Other constitutional claims – like garden-variety prison-conditions claims, which have no necessary effect on the imposition of a death sentence – may be pursued via § 1983.[9] This line is easily administrable in that it turns on the clear answer to a single question: Does the claim at issue challenge either the death sentence itself or some act or procedure necessary for administering that sentence, such that success on the claim will necessarily interfere with the sentence's imposition? If so, it must be pursued on habeas; if not, it may proceed via § 1983. Unlike Nelson's formalistic rule, which opens a gaping loophole in settled habeas corpus restrictions, this line is also sensible in that it requires claims that in a

[9] That is not to say that a § 1983 plaintiff pursuing a claim that does not by its nature affect the imposition of a criminal sentence (say, a living conditions claim) is entitled to obtain a stay of execution while he litigates that claim. He is not. *See infra* Part III.

functional, real-world sense will necessarily interfere with the imposition of a criminal sentence to proceed via habeas.

B. Nothing in *Heck v. Humphrey* Suggests a Different Analysis or Result.

Nelson asserts that the "decisive question" under *Preiser* for determining whether a claim is cognizable under § 1983, or must instead proceed on habeas, is "whether recognition of the claim will necessitate a finding that a state prisoner's underlying conviction or sentence is invalid." Pet. Br. 31 That is incorrect. As shown above – and, indeed, by the very language from *Preiser* on which Nelson relies (*see* Pet. Br. 32) – the determinant in a suit for injunctive relief like Nelson's is whether the claim "challeng[es]" or "attack[s]" a criminal conviction or sentence. *See supra* at 23-24. Because Nelson's does so, it is barred by *Preiser*.

To the extent that Nelson contends that the controlling precedent here is not *Preiser*, but *Heck v. Humphrey*, 512 U.S. 477 (1994), he is mistaken. Nelson cites *Heck* in passing for the proposition that "state prisoners may seek redress under § 1983 if a judgment in the prisoner's favor would not 'necessarily imply' the invalidity of his or her conviction or sentence." Pet. Br. 32. Nelson's point in citing *Heck* is presumably that because his challenge to the use of a cut-down in his execution would not "necessarily imply" the invalidity of his underlying death sentence, his claim is cognizable under § 1983.

Nelson's reliance on *Heck* is misplaced, for two reasons. First, because Nelson's complaint seeks purely injunctive relief from a criminal sentence, rather than damages, his suit is governed by *Preiser*, not *Heck*. Second, even assuming that *Heck* controlled here, Nelson's § 1983-based attack on a medical procedure that is by all accounts a "condition precedent" to his execution would be barred as "necessarily imply[ing] the invalidity" of his sentence.

1. *Preiser*, Not *Heck*, Defines the Scope of Section 1983 for Suits Seeking Equitable Relief From Criminal Sentences.

By its own terms, *Heck* is inapplicable to Nelson's suit, which seeks purely injunctive relief rather than money damages. What the passage in *Heck* from which Nelson excerpts the "necessarily imply" language actually says is that "*when a state prisoner seeks damages in a § 1983 suit*, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487 (emphasis added). Indeed, the *Heck* Court emphasized that Roy Heck's case was "clearly not covered by the holding of *Preiser*" for the very reason that he had *not* sought injunctive relief from his sentence but had instead sought only "monetary damages, as to which he could not 'have sought and obtained fully effective relief through federal habeas corpus proceedings.'" *Id.* at 481 (quoting *Preiser*, 411 U.S. at 488). In short, *Preiser* is an injunctive-relief case, *Heck* was a damages case. *See Heck*, 512 U.S. at 478, 481, 482, 483, 486, 487, 488, 489, 490 ("damages"); *see also Muhammad v. Close*, No. 02-9065, 2004 WL 344163, at * 1 (Feb. 25, 2004) (*Heck* rule applies to "§1983 damages action[s]").

Unlike Roy Heck's, Nelson's suit does not request damages and, in fact, is expressly styled a "Complaint for Injunctive and Declaratory Relief." App. 5. In its prayer, Nelson's complaint seeks purely equitable relief – principally "an order granting injunctive relief and staying [Nelson's] execution." App. 22. Nelson's suit, therefore, is subject not to *Heck*'s rule allowing § 1983 "damages" claims that do not "necessarily imply the invalidity of [a] conviction or sentence," 512 U.S. at 487, but rather to *Preiser*'s rule foreclosing § 1983 claims that "challeng[e]" and seek equitable relief from a state-court sentence, 411 U.S. at 489. This, put simply, is a *Preiser* case, not a *Heck* case.

To the extent that *Preiser*'s rule for injunctive-relief claims sweeps more broadly, and precludes more § 1983 actions, than does *Heck*'s rule for damages claims, there is

good reason. There is a very real difference in the extent to which each type of suit – for damages on the one hand, for injunctive relief on the other – should be viewed as circumventing the habeas statute and its attendant restrictions. In the case of a plaintiff who seeks only damages for an allegedly unconstitutional conviction or sentence, the circumvention of the habeas statute occurs, if at all, only indirectly. The damages plaintiff could not have obtained the monetary relief he seeks in a habeas proceeding. *Preiser*, 411 U.S. at 488. Nor will his suit, even if successful, *ipso facto* give him the equitable relief that habeas corpus is designed to provide; rather, to complete the cycle of circumvention, he will have to file a second suit for injunctive relief and convince a second judge to give the § 1983 damages judgment preclusive, precedential, or persuasive effect. In stark contrast, the plaintiff who files a § 1983 action seeking injunctive relief from his conviction or sentence – *the very relief he could have sought in a habeas petition* – thumbs his nose at the habeas statute's requirements.

The two situations are different, and call for different rules. It makes sense to give more leeway – in the form of a rule that forecloses only those claims that "necessarily imply" a judgment's invalidity – to a § 1983 plaintiff who seeks only damages, and whose suit therefore may be used only indirectly to circumvent traditional habeas restrictions. By the same token, a stricter rule – one that broadly prohibits all "challeng[es]" and "attack[s]" – is warranted in the case of suits seeking injunctive relief from state convictions or sentences, in which the circumvention of the habeas statute is patent, immediate, and certain.

In any event, the important point here is that no matter what standard *Heck* establishes for § 1983 suits seeking only damages – and no matter why *Heck*'s standard may be more permissive than *Preiser*'s – Nelson's suit, which seeks purely injunctive relief from his state-imposed death sentence, is governed by *Preiser*, not *Heck*. Accordingly, Nelson's claims in this case, which "challeng[e]" and "attack[]" his sentence, are not cognizable under § 1983.

2. Nelson's Suit Would Be Barred Even Under *Heck* Because It Necessarily Implies the Invalidity of His Death Sentence.

Under *Heck*, the determinant of a § 1983 damages claim's cognizability is whether that claim, if successful, would "necessarily imply the invalidity of [the prisoner-plaintiff's] conviction or sentence." If so, the § 1983 plaintiff must as a precondition to suit show – as Nelson cannot – that the conviction or sentence has been invalidated in another forum. Because in every real and meaningful sense Nelson's claim does "necessarily imply" the invalidity of his sentence, it is not cognizable under § 1983 even on *Heck*'s seemingly more permissive test.

Nelson's challenge to the use of a cut-down "necessarily impl[ies]" the invalidity of the sentence of death by lethal injection *as it pertains to him* – in *Heck*'s words, "his ... sentence." 512 U.S. at 487. Again, as Nelson himself has correctly recognized, the State "will have to" perform a procedure to gain venous access "in order to carry out the sentence of death by lethal injection." Supp. Cert. Reply 6. And again, the record in this case makes clear that a cut-down will be used only as a "last resort" – only, that is, if it becomes truly "necessary" to administer the lethal injection. *See supra* at 8-10, 28-29. Granting the assumption underlying Nelson's own claim – that a cut-down will become necessary and will in fact be used to carry out his execution – it is clear that Nelson's challenge to that "necessary" procedure would, if successful, leave the State without any available means of administering a lethal injection. And, indeed, given Nelson's failure to choose electrocution when that option was open, which in turn leaves lethal injection as the only means of execution available to him (*see supra* at 4, 28 n.8), Nelson's claim would seemingly prevent the State from carrying out his death sentence *at all*. Accordingly, in every practical, real-world sense, Nelson's § 1983 action would, if successful, "necessarily imply" the invalidity of "his ... sentence" within the meaning of *Heck*.

Nelson, of course, contends that he is not challenging his sentence *per se*, but is instead challenging only a "procedure" for carrying his sentence into effect. *See supra* at 25. But as we have shown, Nelson's effort to separate "procedure" from sentence rests on a formalistic – and ultimately untenable – distinction, because the "procedure" Nelson challenges is by his own admission a necessary predicate – a "condition precedent" – to the imposition of his sentence. *See supra* at 27. In the circumstances of this case, a decision invalidating the "procedure" would also effectively invalidate the sentence.

This Court has made clear that the *Heck* standard should be applied functionally, not formalistically. In *Heck* itself, the Court characterized its holding as reaching beyond claims of "unconstitutional conviction or imprisonment" to encompass, as well, allegations of "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." 512 U.S. at 486-87. The Court thus clarified that *Heck*'s limitations on § 1983 actions extend beyond unvarnished, frontal assaults on convictions and sentences *per se*. Rather, those limitations apply as well – as they must in the real world – to claims that, though perhaps not "directly attributable" to a conviction or sentence, *see id.* at 487 n.6, nonetheless necessarily affect the conviction's or sentence's validity.

In *Edwards v. Balisok*, 520 U.S. 641 (1997) – a decision that Nelson altogether ignores – this Court's emphasis on functional reasoning was even more apparent. There, the Court pointed to *Heck*'s "other harm" language in expressly embracing a practical, functional approach to the question whether a given § 1983 claim "necessarily impl[ies]" the invalidity of a conviction or sentence. Balisok had filed a § 1983 action alleging that the procedures utilized in a prison disciplinary hearing at which he was deprived of good-time credits violated due process. Like Nelson here, Balisok insisted that his challenge was concerned solely with "procedures," and *not* with his ultimate sentence or punishment. *See, e.g.*, Br. for Resp. 6, 7, 8, 16, No. 95-1352

(Aug. 2, 1996). As this Court summarized Balisok's claim, it "posited that the procedures were wrong, but not necessarily that the result was." 520 U.S. at 645. The Ninth Circuit had adopted a formalistic rule that a claim challenging only procedures will *never* "necessarily imply" a punishment's invalidity within the meaning of *Heck* and thus is "always cognizable under § 1983." *Id.* at 644.

In reversing, this Court unanimously rejected the Ninth Circuit's bright-line rule sanctioning all § 1983-based challenges to disciplinary-hearing "procedures." Instead, the *Balisok* Court concluded that while some challenges to procedures will not run afoul of *Heck*, others certainly will. That determination, this Court emphasized, will depend on "the nature of the challenge to the procedures" and whether, in a particular case, the procedural challenge is "such as necessarily to imply the invalidity of the judgment." *Id.* at 645. And, indeed, this Court held that several of Balisok's challenges, although ostensibly aimed solely at the procedures employed, not at the punishment imposed, *did* "necessarily imply" the invalidity of his punishment within the meaning of *Heck*, and were therefore not cognizable under § 1983.

Balisok's functional reasoning applies precisely to this case. Like Balisok, Nelson insists that he is not attacking his sentence *per se*, but is instead challenging a "procedure" used to administer that sentence. That procedural challenge, he says, may proceed under § 1983, without regard to the rules governing habeas corpus practice. What Nelson seeks in this case is a Ninth-Circuit-like rule that a challenge to an execution "procedure" can *never* amount to a challenge to the execution itself. But that is just the sort of wooden formalism that this Court rejected in *Balisok*. It is the "nature of [Nelson's specific] challenge," *id.* at 645, that determines whether his § 1983 claim is foreclosed by *Heck*. Viewed functionally, as *Balisok* shows it should be, it is clear that Nelson's claim is indeed barred. Just as *Balisok* demonstrates that the *legal* relationship between a particular "procedure" and a sentence can be such that a challenge to the former is

tantamount to a challenge to the latter, so, too, the *factual* relationship between the cut-down "procedure" that Nelson attacks and his death sentence – the former being a "condition precedent" to the latter – exposes Nelson's challenge as one directed to his sentence.

C. A Decision Permitting Nelson's Section 1983 Suit Would Gut AEDPA's Successive-Petitions Bar.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court was unanimous as to one point: A death-row inmate's motion to recall an appellate court's mandate (or, for that matter, a court's *sua sponte* recall of its own mandate) may not "be condoned as a mechanism to frustrate [AEDPA's] limitations on second and successive petitions." *Id.* at 569 (Souter, J., dissenting); *accord id.* at 553-54 (majority opinion). The question in this case is whether another device – a civil rights suit brought under § 1983 – should be "condoned" as a means of achieving the very same "frustrat[ion]" of congressional intent. The answer is no.

When it enacted AEDPA's successive-petitions bar as part of its effort "to reduce delays in the execution of state and federal sentences, particularly in capital cases," *Garceau*, 538 U.S. at 206, Congress seemingly had a case like this one in mind. As is evident from the text of 28 U.S.C. § 2244(b) – quoted and discussed in detail above – Congress carefully considered the question when, if ever, a prisoner who has already litigated one habeas corpus petition should be able to collaterally attack his conviction or sentence a second time. As to successive petitions raising claims presented in earlier petitions, Congress answered categorically: never. *Id.* § 2244(b)(1). With respect to claims – like Nelson's here – that were *not* raised in previous petitions, Congress was only slightly more circumspect. As relevant here, Congress determined that an inmate may file a successive petition raising a new claim only where *both* "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* the claim, if successful, would prove by clear and convincing evidence

that the inmate was actually, factually innocent of the underlying offense. *Id.* § 2244(b)(2). *See generally* Hatch Br. 2, 17-21. Here, Nelson's lawyers have conceded - correctly - that Nelson's Eighth Amendment claim does not fit within AEDPA's narrow exceptions. *See supra* at 16-17.

Referring specifically to § 2244(b)'s foreclosure of successive habeas petitions like Nelson's - those presenting claims that do *not* implicate actual innocence but that, for whatever reason, were not available when the first petition was adjudicated - Nelson's counsel, Mr. Stevenson, has in his academic writings lamented what he calls "the problems with AEDPA's successive petition restrictions." Stevenson, *supra*, at 774. Stevenson acknowledges that the most forthright way to "cure" AEDPA's "problems" would be "to seek a congressional amendment to the statute." *Id.* He also realizes, however, that a statutory amendment would require the support of a majority of elected representatives and that "securing such a Congressional majority is ... the big hitch." *Id.* Faced with what he calls that "hitch," Stevenson has said that the courts offer the "best hope" for AEDPA "reform." *Id.* at 776.

The first judicial fix Stevenson has proposed is for this Court to "proceed down the path traveled by the Ninth Circuit" and to "construe the successive petitions provision as exempting claims that were not reviewable at the time of the earlier petition" - *wholly without regard for § 2244(b)(2)'s explicit limitation to new claims that implicate actual innocence.* *Id.* at 778. Ultimately, Stevenson rightly concedes that such a solution is "unmoored in the language of the statute." *Id.* at 781. Nelson's position here is no different. He would have this Court arrive at the same destination as the Ninth Circuit, only by the seemingly more benign route of § 1983.

In seeking habeas-like equitable relief from his sentence in what is nominally a § 1983 action, Nelson is effectively asking this Court to engraft a new exception onto AEDPA's rule prohibiting successive petitions. Nelson would have this Court permit his suit to go forward on the basis that, in view of Alabama's change in execution method, the "factual

predicate" underlying his current claim was not available to him when he filed his first habeas petition - even though he acknowledges that his "claim does not have anything to do with factual innocence" (App. 70) as expressly required by § 2244(b)(2)(B). Nelson's position is every bit as "unmoored" in AEDPA's text and structure as the Ninth Circuit's freewheeling interpretation in that it, too, reads the carefully considered actual-innocence limitation right out of the statute. *See generally* Hatch Br. 2, 17-21.

As this Court held in *Preiser*, the "specific federal habeas corpus statute" must control over the general § 1983 wherever the former "clearly applies." 411 U.S. at 489; *see also Spencer*, 523 U.S. at 21 (Souter, J., concurring). In § 2244(b)(2), Congress made a very "specific determination," *Preiser*, 411 U.S. at 490, not to permit claims like Nelson's to proceed in successive habeas petitions. Nelson may not circumvent that specific determination by the "simple expedient of putting a [§ 1983] label" on what is in substance a successive petition. *See id.* at 489-90.

* * *

Citing *Preiser*, this Court has observed that "[i]t is difficult to believe that the drafters of [§ 1983] considered it a substitute for a federal writ of habeas corpus," and has emphasized "the continuing illogic of treating federal habeas and § 1983 suits as fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 104 & n.24 (1980). Offering § 1983 as a convenient "substitute" for what is in substance a habeas corpus petition - and treating the two very different remedies as "fungible" - is precisely what Nelson's challenge in this case does. This Court should reject Nelson's effort to conflate the two.

III. The Relief Nelson Seeks - A Stay of His Impending Execution - Is Not Available Under Section 1983.

Even assuming that the *claim* Nelson presents is not itself categorically outside the scope of § 1983 on the ground that it "challeng[es]" (or "necessarily impl[ies] the invalidity" of) his sentence, Nelson's suit is nonetheless impermissible

because the *relief* he requests - namely, a federal stay of his impending execution - is not available under § 1983.

This Court's reformulated Question Presented focuses, in a way that Nelson's did not, on Nelson's request for a stay of execution. Nelson's proposed question did not mention the stay request and, indeed, as shown above, presupposed that Nelson's suit did not in any way "attack a conviction or sentence." Pet. i. As reformulated by this Court, however, the Question Presented asks whether a § 1983 complaint brought "by a death-sentenced state prisoner, *who seeks to stay his execution* in order to pursue a challenge to the procedures for carrying out the execution," should be subject to the restrictions on habeas practice. App. 132-33 (emphasis added). This Court's focus on Nelson's stay request is appropriate, because "federal courts lack jurisdiction under § 1983 to stay executions." *Beets v. Texas Bd. of Pardons & Paroles*, 205 F.3d 192, 193 (5th Cir. 2000); *Gilreath v. State Bd. of Pardons & Paroles*, 273 F.3d 932, 933 (11th Cir. 2001) (same); *see also In re Sapp*, 118 F.3d at 462-63.

It is scarcely debatable that "a request for a stay of execution entails a potential federal interference with state penal interests that is equivalent to, if not greater than, the request for immediate release (or speedier release) from prison that was at issue in *Preiser*." *Martinez*, 292 F.3d at 423. Just as in *Preiser* this Court acknowledged the State's compelling interest in making certain that prison sentences are not cut short, so too the State has an overriding interest in ensuring that its death sentences are carried out promptly and not stalled as the result of procedural gamesmanship. For victims' families, and for society at large, endless maneuvering like Nelson's very much implicates the old maxim - quoted by Senator Hatch during the debates on AEDPA's habeas-reform provisions[10] - that "[w]hen the case is proved, and the hour is come, justice delayed is justice denied." *Geo. Walter Brewing Co. v. Henseleit*, 132 N.W. 631,

[10] *See* 142 Cong. Rec. S3362 (Apr. 16, 1996).

632 (Wis. 1911).[11] Accordingly, just as this Court held in *Preiser* that a request for speedier release must proceed, if at all, on habeas corpus, so must a prisoner's "last-minute effort to defeat and delay [his] execution" by way of a stay. *Beets*, 205 F.3d at 193.

The rule that federal courts may not stay impending executions under § 1983 precludes Nelson's suit, but that result was hardly inevitable. That Nelson's stay request is now barred is no one's fault but his own. The record shows that Nelson has known about his "severely compromised veins" and, indeed, "has encountered repeated problems ... with prison medical personnel gaining venous access," for at least "two decades." Pet. Br. 5; App. 7. The implication of this known venous condition for his execution should have been apparent to Nelson, at the latest, by July 1, 2002, when the Alabama Legislature adopted lethal-injection as the State's method of execution. *See* Ala. Code § 15-18-82.1.

Even setting aside what Nelson knew or should have known in July 2002, it is indisputable that Nelson had actual, subjective knowledge of the particulars of his Eighth Amendment claim by August 19, 2003. On that date, Nelson's lawyer reported in a letter to Warden Culliver that "Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins," and acknowledged the possibility that the State might have to use a "'cutdown' procedure" to administer Nelson's execution. App. 25-26.

Nelson, however, did not file his § 1983 complaint in July 2002, or even in August 2003. Nor, for that matter, did Nelson file on September 3, 2003, when the Alabama Supreme Court set his execution for October 9, 2003. Had Nelson filed at any of those times, he may well have been able to litigate his Eighth Amendment challenge without

[11] *See also Thompson*, 523 U.S. at 556 ("Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out.").

requiring a stay of execution. *See, e.g.*, 11th Cir. R. 27, I.O.P. 3 ("Motion to Expedite Appeals"). As it is, Nelson sat on his rights for (at least) a full seven weeks and then sprang his challenge on the State a mere 72 hours before his scheduled execution – at which point he sought a stay of execution and asserted, as a basis for the stay, that in the light of his (now) impending execution "[f]ailure to provide injunctive relief w[ould] result in irreparable harm." App. 20, 22.

In these circumstances, it is hardly unjust to apply to Nelson the rule disallowing federal courts to stay impending executions under § 1983. Thus, even if the nature of Nelson's claim does not take Nelson's suit outside § 1983 (*see* Part II), the relief he seeks does so.

IV. No Matter How Nelson's Suit Is Characterized, Equitable Considerations Require Its Dismissal.

Ultimately, this Court can decide this case without resolving whether either the claim Nelson presents (*see* Part II) or the relief he seeks (*see* Part III) carries his suit outside § 1983's ambit. Instead, this Court can dispose of Nelson's suit, and affirm the court of appeals' decision, on a straightforward application of *Gomez v. United States District Court*, 503 U.S. 653 (1992).

In *Gomez* – which Nelson inexplicably ignores – condemned inmate Robert Alton Harris filed an eleventh-hour § 1983 complaint alleging that California's method of execution violated the Eighth Amendment. After the Ninth Circuit stayed Harris' execution, the State filed a motion to vacate the stay, which this Court granted by a 7-2 vote. The *Gomez* Court gave two distinct reasons for rejecting Harris' complaint and lifting the stay. First, noting that Harris had previously filed four federal habeas petitions, the Court found Harris' § 1983 complaint to be "an obvious attempt to avoid the application" of pre-AEDPA limitations on successive petitions. *Id.* at 653 (citing *McCleskey v. Zant*, 499 U.S. 467).

Separately, and more importantly for present purposes, this Court held that it did not ultimately matter "[w]hether

[Harris'] claim was framed as a habeas petition or as a § 1983 action." *Id.* at 653-54. In either case, "Harris s[ought] an equitable remedy" – namely, a stay of execution. And "[e]quity," this Court emphasized, must take into account both (i) "the State's strong interest in proceeding with its judgment" and (ii) "Harris' obvious attempt at manipulation." *Id.* at 654. Further, observing that "there [was] no good reason for [Harris'] abusive delay" in bringing suit and that Harris had engaged in "last-minute attempts to manipulate the judicial process," this Court held that it would "consider the last-minute nature of [Harris'] application to stay execution in deciding whether to grant relief." *Id.*; *accord Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992); *Herrera v. Collins*, 506 U.S. 390, 425-26 (1993) (O'Connor, J., concurring).

Gomez controls this case and requires dismissal of Nelson's suit, whatever its label. Each of the factors this Court emphasized in *Gomez* is present in this case, as well. *First*, like Harris, Nelson expressly seeks an equitable remedy, namely, "an order granting injunctive relief and staying [his] execution." App. 22. *Second*, given that more than a quarter century has passed since Nelson committed the murders at issue, the State's equitable interest in "proceeding with its judgment" is every bit as "strong" as – and indeed is stronger than – it was in *Gomez*, where only 14 years had elapsed. 503 U.S. at 654; *see also Thompson*, 523 U.S. at 552; *In re Blodgett*, 502 U.S. 236, 239 (1992); *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

Third, just as in *Gomez* there was "no good reason" for Harris' delay in bringing suit, *see* 503 U.S. at 654, there is no excuse for Nelson having sat on his rights. As explained above, Nelson possessed all of the facts necessary to raise his claim as of July 1, 2002, and, at the very latest, subjectively knew of the particulars of his claim on August 19, 2003 – seven full weeks before his scheduled execution. *See supra* at 5, 41-42. *Finally*, and relatedly, by springing his claim on the State and the courts a mere 72 hours before his scheduled execution and then brazenly asserting – based on the

shortness of time – that he would suffer "irreparable harm" (App. 20) in the absence of a stay, Nelson, like Harris before him, plainly engaged in "last-minute attempts to manipulate the judicial process." *Gomez*, 503 U.S. at 654. Nelson's suit is gamesmanship, pure and simple.[12]

The only respect in which this case is even arguably distinct from *Gomez* is the length of each prisoner's delay in bringing suit. In *Gomez*, this Court noted that Harris' challenge to California's use of lethal gas "could have been brought more than a decade ago." *Id.* We acknowledge that Nelson would have had no particular reason to challenge the use of a cut-down procedure ten years ago, as Alabama had not yet adopted lethal injection as its method of execution. Nelson, however, most certainly could have raised his claim – and had every reason to do so – when Alabama switched from electrocution to lethal injection in July 2002, fifteen months before his scheduled execution. He did not. Indeed, even if Nelson's delay is measured not from July 2002 but instead from August 19, -2003, his situation is not so different from Harris' as to call for a different result. It is the *fact* of Nelson's manipulative delay, not its length, that should control.

Had Nelson really wanted to litigate his Eighth Amendment claim – rather than merely to derail the State's capital sentencing process – he could have done so without waiting until the eleventh hour and seeking a stay. Nelson opted instead to lie in wait. He sandbagged both the State and the courts. This Court should not reward Nelson's obvious manipulation of the system.

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[12] *Lonchar v. Thomas*, 517 U.S. 314 (1996), which held that a lower court may not dismiss a *first* federal habeas petition solely on "equitable" *Gomez* grounds, is of no aid to Nelson. Throughout its opinion, the *Lonchar* Court emphasized that the case before it involved a "first habeas petition," *id.* at 319, 321, 322, 324, 325, 329, and distinguished *Gomez* on the ground that it "was not a *first* habeas petition," *id.* at 329 (emphasis in original). Because Nelson's pleading is not, on any reading, a "first habeas petition," this case is controlled by *Gomez*, not *Lonchar*.

V. Nelson Is Not Without a Remedy Here.

We conclude our brief where Nelson began his. Nelson contends that unless he prevails in this case – *i.e.*, unless his Eighth Amendment claim here is cognizable under § 1983 – he will be without "any remedy" at all. Pet. Br. 14, 19, 20. Again, Nelson is wrong.

A. Nelson Had – And Still Has – Viable Remedial Options Open to Him.

Even on the assumption – which underlies the lower courts' decisions and was until Nelson's merits brief accepted as fact by all parties here – "that [Nelson] ha[s] exhausted all available habeas corpus relief" (App. 119 n.2), it simply is *not* the case that § 1983 is the only means by which Nelson could have raised his claim. In fact, Nelson had multiple avenues – some in federal court, and many more in state court – available to him for pressing his Eighth Amendment challenge. For whatever reason, Nelson opted not to avail himself of any (but one) of the remedies open to him, but it simply is not true that he was without a non-§ 1983 remedy to begin with.

One avenue open to Nelson – and the only non-§ 1983 remedy that Nelson bothered to pursue as a means of raising his Eighth Amendment challenge – was a petition for an original writ of habeas corpus in this Court. *See Felker v. Turpin*, 518 U.S. 651 (1996). Nelson filed an application for an original writ alongside his petition for certiorari in this case; this Court denied Nelson's application. *In re Nelson*, 124 S. Ct. 583 (2003).

Nelson had at least three additional avenues open to him in state court. First, subject to generally applicable procedural rules, he could have sought state post-conviction relief on any of several grounds pursuant to what in Alabama is called a "Rule 32" petition. *See* Ala. R. Crim. P. 32.1(a) (State or Federal Constitution requires new sentence), (c) (sentence not authorized by law), (e) (newly discovered facts). Any decision of the Alabama Supreme Court affirming the denial of an Eighth Amendment-based Rule 32

petition on the merits would have been subject to certiorari review in this Court under 28 U.S.C. § 1257. Nelson never filed a Rule 32 petition challenging the use of a cut-down in the administration of his death sentence.

Second, and wholly apart from Rule 32, Nelson could have filed under Ala. R. App. P. 27(a) a response to the State's motion in the Alabama Supreme Court to set his execution date. In that response, Nelson could have argued (as he does here) that his execution should be set aside at least until such time as a cut-down is definitively eliminated as a means of administering his lethal injection. A response to the State's motion to set the execution date would hardly have been futile. The Alabama Supreme Court may not set an execution date without at least allowing time for an inmate's response, *see* Ala. R. App. P. 27(a), (b), and, in fact, that court can (and sometimes will) sua sponte "order[]" an inmate to "file a written response" to the State's motion, *see* Order, *Ex parte Bradley*, No. 85-424 (Oct. 5, 2001). More than once, the Alabama Supreme Court has on the basis of a condemned inmate's response denied the State's motion to set an execution date. *See, e.g.*, Order, *Ex parte Grayson*, No. 1830756 (May 22, 2003). And, indeed, in recently-issued ruling, the court granted a condemned inmate (who, like Nelson, has been on death row for more than 20 years) a *three month* extension of time in which to respond to the State's motion so that he could pursue an open-ended "review of his medical records." Order, *Ex parte Hubbard*, No. 1780688 (Jan. 22, 2004).

In this case, Nelson's lawyers sought the State's consent to an additional seven-day enlargement, beyond the time to which state law already entitled them, in which to file a response to the State's motion to set an execution date. The State consented to, and the Alabama Supreme Court granted, Nelson's requested enlargement. *See* Order, *Ex parte Nelson*, No. 1860528 (Apr. 17, 2003). Nelson never filed a response.

Finally, once his execution was set, Nelson could have filed in state court a motion to stay the execution on federal

constitutional grounds, the denial of which would have been subject to this Court's review under § 1257. *See* Order, *Ex parte Bradley*, No. 85-424 (July 13, 2001) (granting motion to stay execution); *see also In re Tarver*, 528 U.S. 1146 (2000) (granting stay of execution pending disposition of certiorari petition from state court's denial of motion to stay), *cert. denied*, 528 U.S. 1183 (2000). Nelson had every reason and opportunity to file a motion to stay in state court. Again, the record makes absolutely clear that Nelson was actually, subjectively aware of his Eighth Amendment claim on or before August 19, 2003, two weeks before the Alabama Supreme Court set Nelson's execution date, and nearly *two months* before the scheduled execution date itself. (On the afternoon of his scheduled execution, Nelson in fact did file a stay motion in the Alabama Supreme Court, which that court denied as moot after this Court granted Nelson's stay request. For whatever reason, Nelson declined to raise any Eighth Amendment issue in his state-court stay motion; he relied exclusively on state law. *See* Br. in Opp. 4 n.1.)

Nelson, therefore, was not without options.[13] To the extent that Nelson now finds his remedies limited, that is a problem of his own making. By and large, Nelson has refused to avail himself of the non-§ 1983 remedies open to him. He still has offered no explanation for that failure. In any event, Nelson is not without avenues for relief even now. Despite Nelson's failure to pursue viable state-court remedies before, those very outlets remain available to him today – *even if the State prevails in this case*. In the wake of this Court's October 9, 2003, order staying Nelson's execution, *see* 124 S. Ct. 383 (2003), the State, even if it wins here, must go back to the Alabama Supreme Court and ask it to set a new execution date. During the pendency of that request, Nelson may again pursue a Rule 32 petition in the trial court and on appeal. Further, Nelson may respond

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[13] Alabama, of course, is by no means alone in granting condemned inmates access to these and other similar state post-conviction remedies. *See* Br. of Ohio, *et al.*, as Amici Curiae at 22 & n.1.

directly in the Alabama Supreme Court to the State's motion to reset the execution date. And further still, once that court fixes a new date, Nelson may then move to stay.

The State would of course vigorously oppose Nelson's Eighth Amendment challenge to the imposition of his death sentence, but it is not clear how that dispute would be resolved. Neither this Court, nor the Alabama Supreme Court, nor the Eleventh Circuit will have reviewed – let alone decided – the merits of Nelson's claim. The question whether the Eighth Amendment prohibits the use of a cut-down as a predicate to an execution by lethal injection will remain open. And, again, any decision of the Alabama Supreme Court on that question will be subject to this Court's certiorari review under § 1257. (Nelson's implicit suggestion that this Court's § 1257 jurisdiction somehow provides an insufficient check on state courts' decisions concerning execution-related issues is belied by this Court's routine issuance of writs of certiorari to state courts to consider such questions. *See, e.g., Roper v. Simmons*, 124 S. Ct. 1171 (2004) (certiorari to state court); *Atkins v. Virginia*, 533 U.S. 976 (2001) (same); *Bryan v. Moore*, 528 U.S. 960 (1999) (same).)

B. Nelson Has No Absolute Right To Litigate His Eighth Amendment Claim in a Section 1983 Action.

Given the viable state-court options open to him (and the existence of certiorari review in this Court), the fact that Nelson does not have at his disposal the full panoply of federal-court remedies – including § 1983 – is of no particular moment. There are all manner of procedural rules, defenses, and doctrines that, in certain circumstances, will operate to foreclose a federal court's consideration of a federal constitutional claim under § 1983 – even where that claim has never before been decided on the merits. *See, e.g., Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 83-84 (1984) (res judicata); *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (statute of limitations); *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (absolute immunity).

The unstated premise of Nelson's argument here – that because habeas corpus is not available to him, § 1983 must be – has been squarely rejected by this Court. In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court reviewed a lower-court decision holding, in essence, that because under *Stone v. Powell*, 428 U.S. 465 (1976), a state convict could not raise his Fourth Amendment claim in a federal habeas corpus petition, he was entitled to a "federal judicial hearing of that claim in a § 1983 suit." *Allen*, 449 U.S. at 103. This Court expressly rejected that holding, as well as the supposition underlying it "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* That assumption, this Court observed, has no support either "in the Constitution" or "in § 1983 itself." *Id.*

The *Allen* Court added, in words uniquely applicable here, that "[t]he only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." *Id.* at 105. This Court then "emphatic[ally] reaffirm[ed] ... the constitutional obligation of the state courts to uphold federal law" and expressed its "confidence in their ability to do so." *Id.*; *accord, e.g., Stone*, 428 U.S. at 493-94 n.35; *Huffman v. Pursue*, 420 U.S. 592, 611 (1975); *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Thus, even accepting Nelson's view that "[t]he failure to provide any remedy for an Eighth Amendment violation would offend longstanding traditions of justice" (Pet. Br. 14, 19), Nelson simply is not in that boat. Nelson had – and still has – meaningful avenues of relief open to him. As it has done before in *Preiser*, *Heck*, *Balisok*, and *Allen*, this Court should reject Nelson's invitation to anoint § 1983 as a one-size-fits-all remedy.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals and lift the stay of execution.

Respectfully submitted,

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(13)

No. 03-6821

In The Supreme Court of the United States

DAVID L. NELSON,

Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTRODUCTION

Last April, when the State moved to set his execution date, Mr. Nelson took the highly unusual step of responding formally, in writing, with a copy to the clerk of the Alabama Supreme Court, that he did not oppose the execution.[1] He expressly stated that he would not challenge his death sentence and that he hoped that an execution date would be set expeditiously. J.A. 89.

Shortly before Mr. Nelson's transfer to Holman Prison, where the execution was to occur, his counsel took the further unusual step of contacting the Holman warden in an effort to assure that Mr. Nelson's execution by lethal injection would be carried out without problems despite his medical condition. J.A. 25-26. Counsel offered to make a private physician available to consult about the necessary procedure at Mr. Nelson's expense if the warden preferred that to a prison physician. J.A. 8-9. Counsel asked to review the lethal injection protocols so that any medical issues could be resolved in advance. J.A. 25-26. Mr. Nelson even offered to be executed by electrocution to avoid any injection problems that might arise.[2] J.A. 92-93.

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[1] In this letter, Mr. Nelson agreed "that an execution date should be set promptly by the court in the immediate future" and urged the State to take any necessary steps "to insure that an execution date be set in an expedious [sic] manner." J.A. 89. He stated that "he had no plans to contest [the] motion" to set an execution date, nor would his attorneys "be responding to [the] motion . . . , or seek a stay of execution in [his] behalf." *Id.*

[2] The State makes much of Mr. Nelson's failure to request electrocution during the thirty-day window in the summer of 2002 when death-sentenced inmates had an opportunity to do so under the transition provision of the statute that replaced Alabama's electric chair

(Continued on following page)

While acknowledging that Mr. Nelson did have a venous-access problem which would require some attention,[3] the warden rejected all offers of cooperation and assistance from Mr. Nelson and his counsel and rebuffed their efforts to obtain information about the State's injection-procedure protocols – if it had any – that might be employed to deal with this problem. The warden refused to provide assurances that qualified medical personnel or adequate medical support would be available to handle complications arising from Mr. Nelson's compromised veins, and then belatedly proposed a surgical procedure likely to result in gratuitous trauma and suffering. It was to avert this potentially torturous procedure, and for no other reason, that Mr. Nelson's present civil-rights action under 42 U.S.C. § 1983 was filed.

with lethal injection, ALA. CODE § 15-18-82.1(b) (1975). Resp. Br. 4, 28 n.8, 34. Of course, neither this provision nor Mr. Nelson's failure to invoke it is remotely relevant. Mr. Nelson has never objected to being executed by lethal injection; he had no reason, in the summer of 2002, to anticipate that Alabama would insist on performing the venous-access procedure *inhumanely*; and he offered to accept electrocution only as a lesser evil than the inhumane "cut-down" procedure with which he was suddenly confronted in the fall of 2003.

[3] *See* J.A. 93 ("The nurse reported to me that Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line.") (affidavit of Warden Culliver); *see also* J.A. 10 ("Defendant Culliver furthermore acknowledged to counsel for the Plaintiff that the Plaintiff's execution will be the first instance of the State of Alabama having to perform a medical procedure prior to the execution to gain venous access.") (Complaint for Injunctive and Declaratory Relief); J.A. 51 ("the protocol that is going to be planned for this execution is a little different than the ones that we've had. . . . ") (counsel for the State at in-chambers telephone conference).

The State rests its argument that Mr. Nelson's § 1983 complaint should be barred as a successive habeas corpus petition on the general proposition that death-row prisoners are prone to file vexatious pleadings aimed at thwarting executions, not on the facts of Mr. Nelson's own case. Mr. Nelson's case presents a very different situation than the one the State purports to fear – a situation wholly remote and readily distinguishable from any inmate's efforts to avoid or delay an execution.[4] Mr. Nelson accepts the inevitability of his execution and seeks only to have it conducted without needless brutality.

Mr. Nelson's § 1983 action does not challenge his death sentence or any aspect of the criminal proceedings or judgment that authorizes his execution. No relief he could obtain in this action would invalidate those proceedings or that judgment in whole or in part. Mr. Nelson's complaint questions only the decision of a prison official to conduct a potentially excruciating surgical procedure as the unnecessary prelude to his execution. J.A. 67. It does not question lethal injection as a mode of execution and does not dispute that the State is entitled to obtain venous access through any necessary, medically appropriate procedures, including surgical procedures. Mr. Nelson asks only to have judicial protection against *un*necessary and ill-advised surgery performed by unqualified state agents at the warden's *ad hoc* behest and which exposes him to

[4] *Compare Gomez v. United States District Court*, 503 U.S. 653 (1992).

"the gratuitous infliction of suffering"[5] in violation of the Eighth Amendment.

ARGUMENT

I. MR. NELSON'S COMPLAINT IS COGNIZABLE UNDER § 1983.

The State concedes that "State prisoners in Nelson's shoes – *i.e.*, those who have previously filed federal habeas petitions – may of course file § 1983 complaints challenging the conditions of their confinement." Resp. Br. 22. However, it asserts that Mr. Nelson's complaint "Directly Challenges the Imposition of His Death Sentence." Resp. Br. 23. There is no basis for that characterization in the record. Rather, Mr. Nelson has explicitly, consistently, and repeatedly disavowed challenging his death sentence or its imposition.

The State argues that because venous access is required before a lethal injection can be carried out, Mr. Nelson's § 1983 complaint necessarily challenges his sentence. However, the complaint does not contest the State's right to obtain access to Mr. Nelson's veins. It does not contest the State's use of surgical procedures for that purpose, or the State's use of any other procedures necessary to carry out Mr. Nelson's execution. That the physical abuse which is the sole subject of Mr. Nelson's constitutional complaint will occur in the course of preparing him for execution does not convert that complaint into an

[5] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

attack on his death sentence.[6] Nor should it insulate the abuse from legal scrutiny.

The State's repeated contention that the relief sought by Mr. Nelson "would seemingly prevent the State from carrying out his death sentence *at all*" (Resp. Br. 34; *see also id.* at 1, 12, 17, 21, 24-35, 44, 48) is a complete fiction. Nothing in the cause of action pleaded by Mr. Nelson's § 1983 complaint and now before this Court would or will support any form of relief that prevents his execution. And the only reason why the adjudication of the complaint has required even a temporary stay of execution is that the State waited until six days before the scheduled execution date to unveil its latest plans for a "cut-down" surgical procedure and then persisted in those plans rather than conducting settlement discussions as suggested by the district court below – discussions that Mr. Nelson's counsel expressed an immediate willingness to pursue.[7]

[6] Constitutional issues concerning *the particular method* by which a State undertakes to access a prison inmate's veins can arise in situations having nothing to do with a scheduled execution. If the State required venous access to Mr. Nelson for HIV or other blood testing, or some other incident of prison existence, and proposed to obtain it through the use of unqualified personnel in a medically inappropriate manner that creates a needless risk of pain, Mr. Nelson could bring a § 1983 action alleging essentially the same cause of action. And here, indeed, the State originally proposed addressing Mr. Nelson's medical problems *twenty-four hours before* his scheduled execution. J.A. 11.

[7] During an in-chambers telephone conference, the district court inquired as to whether there was "any likelihood that you lawyers could get together and agree on a procedure that would be acceptable to both sides for the location of the vein." J.A. 73. In response, Mr. Nelson's attorney stated, "I would certainly be open to that." *Id.* Mr. Nelson's willingness to resolve this case through such an agreement demonstrates the baselessness and unfairness of the State's contention that Mr. Nelson's actual intent is to avoid his execution.

A. *Heck* and *Preiser* Authorize the Review Sought By Mr. Nelson.

The State argues that Mr. Nelson cannot maintain his § 1983 action under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck v. Humphrey*, 512 U.S. 477 (1994), because he seeks injunctive relief. The State says that "[b]y its own terms, *Heck* is inapplicable to Nelson's suit which seeks purely injunctive relief rather than monetary damages." Resp. Br. 32. Neither *Heck* nor any other decision of this Court will support such a reading.

Heck holds that a claim is properly cognizable under § 1983 if a judgment in favor of the plaintiff would not "necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487. Although *Heck* announced this rule in the context of a claim for money damages, there is nothing in *Heck*'s language or logic to suggest that the rule is limited to such claims; and *Heck* has not been so limited in subsequent decisions. For example, *Edwards v. Balisok*, 520 U.S. 641 (1997), involved a § 1983 action by a prison inmate alleging that certain disciplinary hearing procedures violated due process and seeking three types of relief: (1) money damages; (2) declaratory relief; and (3) prospective injunctive relief. In remanding the claim for prospective injunctive relief, the Court observed that "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good time credits, and so may properly be brought under § 1983." 520 U.S. at 649 (quoting *Heck*, 512 U.S. at 487). *See also Muhammad v. Close*, 124 S. Ct. 1303, 1304 (2004) (per curiam) (recognizing that *Edwards* "applied *Heck* in the circumstances of a § 1983 action claiming damages *and equitable relief* for a procedural defect in a prison administrative process. . . . ") (emphasis added).

In any event, the rules laid down by *Preiser* and by *Heck* do not differ in any way that is material for present purposes. The rule of *Preiser* is that a state prisoner must proceed by way of habeas corpus and cannot file an action under § 1983 when "challenging the very fact or duration of his physical imprisonment." 411 U.S. at 500. *Preiser* precludes a § 1983 suit for an injunction if – but only if – "the relief [that the plaintiff] seeks is a determination that he [or she] is entitled to immediate release or a speedier release from . . . imprisonment." *Id.* Mr. Nelson's § 1983 suit seeks no such relief, and *Preiser* therefore does not bar it.

B. A Federal Court Has Authority to Grant the Relief Sought by Mr. Nelson Under § 1983.

Mr. Nelson's request for a stay of execution to enable the district court to adjudicate his Eighth Amendment challenge to the proposed "cut-down" procedure before it was used on him did not take his suit "outside § 1983's ambit." Resp. Br. 12. There is no basis for the State's contention that "[b]ecause a request for a stay of execution entails a federal interference with state penal interests at least as grave – if not more so – than the request for speedier release at issue in *Preiser*, federal courts may not stay impending executions under § 1983." Resp. Br. 12; *see also id.* at 40-42. This Court has repeatedly held that federal courts are empowered to enjoin a state's unconstitutional conduct; and in *Mitchum v. Foster*, 407 U.S. 225, 243 (1972), the Court recognized that § 1983 suits are "expressly authorized" exceptions to the Anti-Injunction

statute, 28 U.S.C. § 2283.[8] *Mitchum*, indeed, observed that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* at 242; *cf. Pennsylvania v. Union Gas*, 491 U.S. 1, 41-42 (1989) (Scalia, J., concurring) (noting that the Civil Rights Act of 1871 was intended to be a "limitation[ ] of the power of the States and enlargement[ ] of the power of Congress"), *overruled on unrelated grounds by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).[9] Across a wide

[8] 28 U.S.C. § 2283 provides that a federal court may not grant an injunction staying state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[9] Mr. Nelson does not suggest that *Mitchum* exempts § 1983 suits from comity concerns or from requirements that a plaintiff pursue appropriate state procedures for redress before resorting to federal court. However, because Mr. Nelson here did exhaust all available state procedures, his ultimate recourse to federal court was proper. Mr. Nelson gave the State every possible opportunity to address his concerns administratively. There are no applicable formal grievance procedures at the Holman Correctional Facility, but he and his counsel made repeated efforts to communicate with the warden and the Department of Corrections. J.A. 25-26, 27-28, 92. The State did not raise any claim of non-exhaustion of state remedies in the district court or identify any other administrative processes that Mr. Nelson could have pursued but did not. Its belated non-exhaustion arguments should not be heard in this Court in the first instance. They are either waived or, to the extent that they have not been waived and that they have any remotely colorable foundation, they can be addressed on the basis of informed local knowledge after adequate factual development in the district court on remand. *Cf. Muhammad v. Close*, 124 S. Ct. 1303, 1307 (2004) (per curiam) (a defense is waived if the defendant failed to raise it below "when its legal and factual premises could have been litigated").

range of circumstances, this Court has not hesitated to intervene or uphold federal intervention in state proceedings when an individual claiming the protection of a federal constitutional right would otherwise be subject to the irremediable denial of that right[10] or could not assert the right elsewhere.[11] *See generally Ex parte Young*, 209 U.S. 123 (1908). In his principal brief at page 34 n.28, Mr. Nelson cited a number of cases in which federal courts have granted or upheld stays of execution pending the outcome of a § 1983 action.[12] "And this Court long ago

[10] The double jeopardy cases are paradigmatic. *See, e.g., Smalis v. Pennsylvania*, 476 U.S. 140, 143 n.4 (1986) (concluding that the Court had jurisdiction under 28 U.S.C. § 1257(3) to address a double jeopardy issue arising from the Pennsylvania Supreme Court's determination that the defendant, previously acquitted due to insufficiency of the evidence, could be retried); *Harris v. Washington*, 404 U.S. 55, 56-57 (1971) (per curiam) (approving federal court intervention when the state courts refused to dismiss a prosecution challenged on double jeopardy grounds).

[11] *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978) (holding that abstention principles do not bar a federal suit challenging the constitutionality of a marriage statute when there is no currently pending state court proceeding in which to raise the challenge); *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (upholding a federal suit that challenged pretrial detention of state criminal defendants without a probable cause hearing, because the harm of allegedly unconstitutional pretrial incarceration could not be remedied in or by any ongoing state court proceedings); *Gibson v. Berryhill*, 411 U.S. 564, 572 (1973) (approving a federal suit challenging ongoing state license-revocation proceedings where the licensing board was found to be biased against the plaintiff); *see also Heck v. Humphrey*, 512 U.S. 477, 503 (1994) (Souter, J., concurring).

[12] The State and its amici inaccurately state that the Sixth and Eighth Circuits have adopted a bright line rule that "federal courts lack jurisdiction to stay executions under § 1983." *See* Resp. Br. 40; Br. of Ohio, *et al.*, as Amici Curiae 9. However, neither circuit has assumed such a position. *See In re Sapp*, 118 F.3d 460, 463-64 (6th Cir. 1997)

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recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum*, 407 U.S. at 242. There are ample safeguards against potential abuses of this federal injunctive authority, making it unnecessary and imprudent to deny the authority altogether.[13] *Id.* at 243.

II. EVEN IF MR. NELSON'S § 1983 COMPLAINT WERE TO BE TREATED AS A HABEAS CORPUS PETITION, IT WOULD NOT BE BARRED AS A SUCCESSOR BECAUSE, LIKE THE HABEAS PETITION AT ISSUE IN *MARTINEZ-VILLAREAL*, IT PRESENTS A CLAIM THAT WAS NOT RIPE AT THE TIME OF ANY PRIOR HABEAS PROCEEDINGS.

The State argues at length in its brief that the Eighth Amendment issue presented by Mr. Nelson's § 1983 action could not meet the requirements for a successive habeas corpus filing under 28 U.S.C. § 2244(b). Mr. Nelson does not dispute that and never has. Rather, Mr. Nelson has

(examining the merits of plaintiff's § 1983 claim despite plaintiff's request for a stay of execution); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (granting a stay of execution based on plaintiff's § 1983 complaint challenging the constitutionality of clemency procedures).

[13] Defendants in § 1983 actions can seek early dismissal of the proceedings under FED. R. CIV. PRO. 12(b) or move for prompt judgment on the pleadings pursuant to Rule 12(c) or Rule 56. And in cases brought by prison inmates, a district court can summarily dismiss a petition *on its own motion* under 42 U.S.C. § 1997e(c) if it appears to be "frivolous, malicious, [or] fails to state a claim on which relief can be granted. . . ."

simply pointed out that if this Court deems that habeas corpus is the preferred procedure for resolving the constitutional issues raised by his unique circumstances, the recharacterization of his § 1983 complaint as a habeas corpus application would not require its preclusion as a second or successive application.[14] On this point, *Stewart v.*

[14] When questioned by the district court below, counsel for Mr. Nelson acknowledged that Mr. Nelson had "been through the federal system and the state system at least once" and that "if this was a successive 2254, we would certainly have to get permission" from the court of appeals to file it. J.A. 64. He also acknowledged that Mr. Nelson's constitutional challenge to the warden's proposed cut-down procedure for obtaining venous access would not meet the § 2244(b)(2)(B)(ii) requirement for "gatekeeper" permission because "obviously, Your Honor, I mean our claim does not have anything to do with factual innocence." J.A. 70. But counsel nowhere conceded that Mr. Nelson's § 1983 complaint *would* be a "successive 2254" if it were treated as a habeas petition. *See generally* J.A. 64-65, 69-70, 72. The court of appeals misread the record when it took the view (in footnote 2 of its opinion, at J.A. 119-20) that counsel's concession went that far. Counsel's first response to the district court's question "Why have you waited until now [to file the challenge to the "cut-down" procedure]" was that "it really didn't become ripe until he got to Holman." J.A. 65. The district court then pressed counsel with questions as to whether this circumstance would bring the case within § 2244(b)(2)(B) (*see, e.g.*, J.A. 69: "Why couldn't this fall within a factual predicate that wasn't discovered previously?") and counsel replied that even if the new-factual-predicate requirement of § 2244(b)(2)(B)(i) were satisfied, the factual-innocence requirement of § 2244(b)(2)(B)(ii) would not be; thus, counsel was concerned that under the Eleventh Circuit's habeas precedents, gatekeeper permission could not possibly be obtained. The district court continued to explore the basis for this concern and counsel continued to explain that he could not expect to get "gatekeeper" authorization from the Eleventh Circuit *if* he sought it on the theory that Mr. Nelson's present proceeding was a second or successive habeas application:

> [THE COURT]: But let's get back to the habeas issues. So you're saying that under 2244, you can't challenge a last minute claim of cruel and unusual punishment in the

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Martinez-Villareal, 523 U.S. 637 (1998), is clear and unmistakably controlling. Pet. Br. 36-37.

The State devotes curiously little attention and no real analysis to *Martinez-Villareal*. While Martinez-Villareal's competency-to-be-executed claim had been raised in an earlier petition than the one this Court held entertainable without "gatekeeper" authorization under 28 U.S.C. § 2244(b)(3), that fact was not important in this Court's reasoning. Instead, the Court focused on the fact that the claim was not ripe until after Martinez-Villareal's initial habeas corpus proceedings had been concluded and thus could not have been raised in those previous proceedings. *Id.* at 643, 645 (at the point when "it became clear that [Martinez-Villareal] would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme Court issued a warrant for his execution . . . [h]is claim then [became] unquestionably ripe";

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manner of execution, assuming those facts did not arise until the last minute. That's your concern, Mr. McIntyre?

MR. McINTYRE: Judge, I'm sorry, would you say it one more time?

THE COURT: Is your concern that you *might not be able* to raise an Eighth Amendment claim to the manner of execution even if those facts that give rise to the claim did not arise until the last minute?

MR. McINTYRE: Yes.

THE COURT: *As long as you were subject to a successive petition rule.*

MR. McINTYRE: Yes.

J.A. 71-72 (emphasis added).

Martinez-Villareal "brought his claim in a timely fashion, and it has not been ripe for resolution until now").[15]

Just as the competency-to-be-executed claim in *Martinez-Villareal* was previously unripe and therefore outside the purview of the "second or successive habeas corpus application" provisions of § 2244(b)(2) and (3), Mr. Nelson's claim did not ripen until the State proposed using a "cut-down" procedure to gain venous access, long after all normal federal habeas corpus proceedings in Mr. Nelson's case had been finally adjudicated. It bears repeating – the more so because of the State's efforts to obscure these central facts in a cloud of concealing dust – that:

(1) Alabama did not even *have* lethal injection as its means of execution when Mr. Nelson's single federal habeas corpus proceeding was finally decided adversely by the United States Court of Appeals for the Eleventh Circuit in June of 2002;

(2) Mr. Nelson could not possibly have complained about the warden's plans to employ a "cut-down" procedure for obtaining venous access until

   (a) Alabama adopted lethal injection as its mode of execution, and

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[15] It is true that the Court in *Martinez-Villareal* left open the question whether the claim would have been cognizable if it had not been presented in Martinez-Villareal's initial federal habeas corpus petition. *Id.* at 645 n.*. But nothing in the rationale of *Martinez-Villareal* can logically support a distinction between previously-presented-but-unripe claims and claims not previously presented because they were unripe.

(b) the warden decided and announced his plans regarding the "cut-down" procedure, which

(c) the warden did not announce – and apparently did not even decide – until about a week before Mr. Nelson's scheduled execution in October of 2003.

Under these extraordinary circumstances,[16] the State's position that Mr. Nelson's sole means of challenging the "cut-down" procedure is a "second or successive" habeas petition ineluctably dismissible as such amounts to the self-same *either-too-early-or-too-late-and-therefore-never* argument that the Court in *Martinez-Villareal* rejected as "perverse." *Id.* at 638.[17]

[16] The extreme novelty of the circumstances of Mr. Nelson's case is evident when one considers the number of lethal injections in the United States that have occurred without reported problems related to a prisoner's medical condition. Nationwide, there have been approximately 734 executions by lethal injection since 1976, and in only a few cases has an issue about compromised veins been reported. *See* DEATH PENALTY INFORMATION CENTER, SEARCHABLE DATABASE OF EXECUTIONS, *available at* http://www.deathpenaltyinfo.org/executions.php (last visited Mar. 15, 2004) (indicating that 734 people have been executed by lethal injection since 1976); *Cooper v. Rimmer*, __ F.3d __, No. 04-99001, 2004 WL 232377 (9th Cir. Feb. 8, 2004) (questioning the propriety of a potential cut-down procedure); *Reid v. Johnson*, No. 03-7916 (4th Cir. Dec. 17, 2003) (order granting stay of execution), *motion to vacate stay denied sub nom., Johnson v. Reid*, 124 S. Ct. 980 (2003) (same).

[17] *See also, e.g., James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002) (holding that when a subsequent habeas petition contains a new claim that could not have been raised in the prior habeas petition, the court will not consider that newly discovered claim successive) (citing *Galtieri v. United States*, 128 F.3d 33, 37-38 (2d Cir. 1997)); *Hill v. Alaska*, 297 F.3d 895, 899 (9th Cir. 2002) (holding that claims relating to a prisoner's parole that were never addressed by a district court and could

(Continued on following page)

III. THERE ARE NO PROCEDURAL BARRIERS TO REVIEW OF MR. NELSON'S CLAIM.

The State argues for the first time in its merits brief to this Court that Mr. Nelson's claim is "in all likelihood barred by *Teague v. Lane*, 489 U.S. 288 (1989)." Resp. Br. 21. But the State never raised any *Teague* contention in the lower courts or in its Brief in Opposition to Certiorari and its *Teague* defense should not be entertained here. *See, e.g., Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993); *Schiro v. Farley*, 510 U.S. 222, 229 (1994). The State's *Teague* contention is vacuous in any event, because Mr. Nelson seeks no new rule of constitutional criminal procedure that would implicate *Teague*. His claim neither "breaks new ground [n]or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. The State's obligation to avoid the infliction of unnecessary pain in carrying out an execution has been

not have been presented in earlier petitions were not successive; therefore, the prisoner need not obtain "gatekeeper" permission to file his petition); *Crouch v. Norris*, 251 F.3d 720, 725 (8th Cir. 2001) (holding that a "petition, which neither raises a claim challenging [petitioner's] conviction or sentence that was or could have been raised in his earlier petition, nor otherwise constitutes an abuse of the writ, is not 'second or successive' for purposes of § 2244(b)"); *In re Cain*, 137 F.3d 234, 236-37 (5th Cir. 1998) ("Congress did not intend for the interpretation of the phrase 'second or successive' to preclude federal district courts from providing relief for an alleged procedural due process violation relating to the administration of a sentence of a prisoner who has previously filed a petition challenging the validity of his conviction or sentence, but is nevertheless not abusing the writ."); *Nguyen v. Gibson*, 162 F.3d 600, 601 (10th Cir. 1998) (dismissing claim under *Ford v. Wainwright*, 477 U.S. 399 (1986) that could have been raised in prisoner's first habeas petition, but specifically noting that it would be a different situation if the prisoner's claim only became known after his first federal habeas petition was filed).

established constitutional law for more than half a century. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

The State contends alternatively that "Nelson has made no effort whatsoever to exhaust his state remedies . . . [although] 28 U.S.C. § 2254(c) . . . [requires that an] inmate must exhaust 'any available procedure' for raising his claim in state court." Resp. Br. 20. This, too, is a point entirely without merit. At the time when Mr. Nelson's Eighth Amendment claim arose, there were no state court procedures available through which he could raise it. The Alabama courts refuse to entertain constitutional challenges to procedures relating to an execution after a condemned inmate's two-year statute of limitations for post conviction filings under Rule 32 of the Alabama Rules of Criminal Procedure has passed,[18] even when a claim rests on newly discovered evidence.[19] And the procedures suggested by the State (Resp. Br. 46) for requesting the Alabama Supreme Court to postpone setting an execution date have no application to Mr. Nelson's situation precisely *because* his federal constitutional claim does not go to the fact of his execution or its timing as such but solely to the

[18] *See Tarver v. State*, 761 So. 2d 266 (Ala. Crim. App. 2000). Pursuant to ALA. R. CRIM. P. 32.2(c) Mr. Nelson had two years from the date on which his direct appeal was concluded in the state court system to file his state post conviction petition. Mr. Nelson's direct appeal was concluded on September 24, 1996. Thus, his state postconviction petition was due September 24, 1998.

[19] *See Tarver v. State*, 769 So. 2d 338 (Ala. Crim. App. 2000). In any event, Mr. Nelson could not have sought relief on a theory of newly discovered evidence because the facts underlying his claim do not go to factual innocence, and newly-discovered-evidence claims must meet the factual innocence requirement of ALA. R. CRIM. P. 32.1(e) to be cognizable in state postconviction proceedings.

way the warden plans to accomplish venous access physically. Because there is "an absence of available State corrective process" for this claim, its exhaustion is neither possible nor required. 28 U.S.C. § 2254(b)(1)(B)(i).

CONCLUSION

The State's brief offers no grounds on which the decision below can be upheld. The Court of Appeals should be reversed and the case remanded for a determination of the merits of Mr. Nelson's federal constitutional claim that the "cut-down" procedure would constitute the infliction of cruel and unusual punishment forbidden by the Eighth Amendment.

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No. 03-6821

IN THE

Supreme Court of the United States

DAVID NELSON,

Petitioner,

—v.—

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF LAURIE DILL, M.D., FRANK GOGAN, M.D., GARY KALKUT, M.D., MARK C.D. MARSHALL, M.D., JANE MOBLEY, M.D., & WILLIAM WINTERNETZ, M.D. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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January 22, 2004

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INTEREST OF THE AMICI CURIAE[1]

Each of the *amici curiae* is a medical doctor.[2] Our practices require us to be familiar with current practices in obtaining intravenous access, including the surgical procedures necessary to gain access to central veins.

The underlying dispute in this matter concerns the State of Alabama's intent to utilize a medical procedure known as a "cut-down" in a non-surgical setting in order to gain access to a functional vein, and thus enable the Petitioner's execution by lethal injection. We understand that the Court is concerned principally with how a challenge to such a procedure may be brought, and we offer no view on that question. We do, however, write briefly to set forth current medical standards for gaining intravenous access in individuals who have compromised veins.

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk.

[2] Laurie Dill, M.D., practices internal medicine in Montgomery, Alabama, and has been a physician for 17 years. Frank Gogan, M.D., has practiced general medicine in Montogmery, Alabama, and has been a physician for 23 years. Gary Kalkut, M.D., has practiced internal medicine in New York City for 20 years, and has several years of experience in providing medical services to prisoners. Mark C.D. Mitchell practices emergency medicine in Daphne, Alabama, and has been a physician for 21 years. Jane Mobley practices internal medicine in Birmingham, Alabama, and has been a physician for 17 years. William Winternetz practices internal medicine in Tuscaloosa, Alabama, and has been a physician for 26 years.

STATEMENT

This matter arises from an order of the Alabama Supreme Court that the Petitioner, David Nelson, be executed by lethal injection. In the weeks leading up to Nelson's October 9, 2003 execution date, the parties became aware that Nelson's poor vein structure made peripheral venous access in his hands and arms impracticable. Thereafter, the Warden of Holman Prison informed Nelson and his counsel that in order to gain adequate access, the State would attempt a cut-down procedure to locate an adequate vein in Nelson's upper thigh or arm.

Shortly before the scheduled execution, Nelson filed the instant suit, asserting that the State's employment of a cut-down procedure, in a prison setting, and under the circumstances outlined by the Warden, was both reckless because of the irresponsible manner in which the State was proposing to conduct the procedure, and unnecessary because of less painful, less traumatic and safer alternatives.

Nelson supported his claims with the affidavit of a Board Certified anesthesiologist, Mark Heath, M.D. Dr. Heath asserted the cut down is a potentially risky surgical procedure. He described the procedure as painful and disturbing, specifically the smoke, odor, as well as the buzzing and sizzling noises that can result from cautery. JA 32. Dr. Heath indicated that cut-down procedures are usually performed under deep sedation, with the administration of potent intravenous analgesics (drugs that block pain), because otherwise they would be extraordinarily disturbing and distressing. *Id.* Finally, he asserted that a cut-down procedure is a procedure that should be performed only by a physician or practitioner who is specifically trained and credentialed to perform that procedure. JA 32-33. Moreover, given the near uni-

versal adoption of superior techniques, Dr. Heath explained there is no comprehensible reason for the State of Alabama to employ the cut-down procedure to obtain intravenous access. JA 37.

The State countered with affidavits from the Warden and a medical doctor, Marc Sonnier. J.A. 90-94. The Warden explained that the State was now prepared to use the cut-down procedure in the event that access to veins in the thigh and neck proved unavailable, and that an unidentified medical doctor would perform any of the needed procedures. J.A. 93-94. He further stated that if the cut-down procedure was utilized, Nelson would be given local anesthesia. J.A. 94. Dr. Sonnier explained that he was familiar with each procedure outlined by the Warden and that none of the procedures, if performed in the prison setting, would pose any significant risk to Nelson. J.A. 90-91.

The parties disagree profoundly upon the nature of the cut-down procedure and adequacy of the state's plan to employ it. We offer this brief to advise the Court on these areas of dispute.

ARGUMENT

From our experience and training, the disputed issues do not present close questions. The Petitioner has fully and fairly described how current medical practice views the appropriate use of cut-down procedures, and why the State's hastily assembled plan to utilize it is sharply inconsistent with such practice.

1. The Cut-Down Procedure is an Invasive Surgical Procedure That Requires Appropriate Safeguards

The cut-down procedure is an accepted medical procedure when conducted in the correct setting, by a properly trained physician, and where less intrusive procedures are unavailing. "Venous cutdown is contraindicated when less invasive alternatives exist or when excessive delay would be required for the procedure to be performed." Steven C. Dronen and Patricia Lanter, *Venous Cutdown*, *in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998).

"Performance of a rapid, effective cutdown can be achieved only by thorough knowledge of the procedure and attention to its many details." *Id.* There are a host of reasons why cut-down must be performed in the correct setting, and by an adequately trained physician. The ultimate objective of the procedure is to go deeply into an arm, leg, or chest to locate large, uncompromised veins. "Detailed knowledge of anatomy is imperative to the success of this procedure." *Id.* Moreover, "[t]he choice of a particular vein should be governed by its accessibility and size and by the physician's experience and training." *Id.* Skill and practice are especially important in cut-down procedures, because they require cutting through tissue, fat, and muscle; such deep invasion breaches small arteries and causes bleeding.

Given the nature of the procedure, there are numerous possible complications that the physician must take precautions to avoid. *See id.* Whenever deep incisions are made, there is a clear risk of rupturing large blood vessels. Such a breach can cause a severe hemorrhage. When the procedure is used in the neck area, two additional risks arise: cardiac dysrhythmia, an abnormality of

the electrical activity of the heart, and pneumothorax, which induces the sensation of suffocation. *See Venous Cut Down: A Quicker and Safer Technique* (visited Jan. 20, 2004), The Royal College of Surgeons, Surgical Knowledge and Skills Website <http://www.edu.rcsed.ac.uk/operations/op4.htm>. Cutdown also causes significant physical pain and obvious psychological and emotional stress. "An indirect but significant complication is deterioration of an unstable patient during a time-consuming cutdown attempt." Steven C. Dronen and Patricia Lanter, *supra.*

Because of these and other risks,[3] it is necessary that this procedure take place in a hospital or otherwise appropriate medical setting. All of the complications that can arise require ready access to equipment found only in the hospital setting, and to trained staff who can competently assist the physician.[4] In the absence of sufficient, qualified, available staff and other doctors, a physician would lack the assistance necessary to deal adequately with complications as they arose.

It is also accepted practice that cut-down procedures should be performed by physicians who have specialized

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[3] The complications of venous cut-down include local hematoma and infection, sepsis, phlebitis, embolization, wound dehiscence, and injury to associated structures. Steven C. Dronen and Patricia Lanter, *Venous Cutdown*, *in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998).

[4] For instance, acceptable protocol requires that "[i]f a physician is unable to insert a catheter after three attempts, he or she should seek help rather than continue to attempt the procedure. The incidence of mechanical complications after three or more insertion attempts is six times the rate after one attempt." David C. McGee, M.D., and Michael K. Gould, M.D., *Preventing Complications of Central Venous Catherization*, 348 N. ENGL. J. MED. 1123, 1128 (2003).

training in the area.[5] "As with most medical procedures, the level of experience of the physician reduces the risk of complications." McGee and Gould, at 1128. This is not a procedure that all physicians would feel comfortable performing, and the risk of complication or error is significantly lessened when skilled, trained physicians perform the procedure.[6] "[Even] insertion of a catheter by a physician who has performed 50 or more catherizations is half as likely to result in a mechanical complication as insertion by a physician who has performed fewer than 50 catherizations." McGee and Gould, at 1128.

Moreover, to lessen the pain, trauma and anxiety of the patient, it is also accepted practice that a general anesthesia or deep sedation be utilized. Many, if not most patients are profoundly traumatized by the sight of copious amounts of their own blood, and by the pungent odors that arise from such procedures as cautery.

We believe that any competent physician, if asked to support the State's plan to resort to the cut-down under the instant conditions—without the guarantee of adequate equipment, a certified and trained practitioner to perform

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[5] Emergency medicine, surgery, anesthesiology and cardiology are the four areas of medicine most likely to provide doctors with experience in cut-down procedure. Doctors outside of these specialties may well have never performed a cut-down.

[6] Case law includes numerous examples of how inexperience and lack of skill in cut-down procedure can lead to devastating pain and suffering in patients. *See, e.g., Crawford County State Bank v. Grady*, 514 N.E. 2d 532 (Ill. App 4 Dist. 1997) (multiple cut downs on leg cause swelling and eventual gangrene in foot; foot is later amputated); *Edwards v. Our Lady of Lourdes Hosp.*, 526 A. 2d 242 (N.J. Super. A.D. 1987) (after cut down, inexperienced physician inserts catheter in artery, not vein; right leg is later amputated at the hip after gangrene develops); *Barrette v. Hight*, 230 N.E. 2d 808 (Mass. 1967) (during cut down by inexperienced doctor, lateral nerve in arm is severed and median nerve is damaged).

the procedure, licensed medical support staff, and a surgical environment, and without having first ruled out the safer, far less painful preferred procedures—would refuse. For all of the foregoing reasons, a cut-down procedure should not be utilized in a prison environment unless it is fully equipped to provide safe surgery.

2. Less Intrusive and Safer Procedures Are Available

Modern medicine provides the State of Alabama with plainly superior options. Indeed, we believe most trained physicians, in the absence of normal peripheral venous access, would only resort to a cut-down after definitively ruling out the other, safer, less invasive procedures.

These preferred procedures are well established. "[A] method of rapid fluid infusion that is technically easier and faster than venesection is the percutaneous insertion of large-bore introducer devices into the subclavian, internal jugular, or femoral veins." Steven C. Dronen and Patricia Lanter, *Venous Cutdown, in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998). "Venous cutdown is only indicated where more rapid and less invasive venous access is not obtained. Options include cannulation of the femoral vein or neck veins . . . ." Tracey Tay, *Venous Cutdown, in* The LIVERPOOL HOSPITAL MANUAL OF TRAUMA CARE (Scott K. D'Amours et al. eds., 6th ed. 2002). Medical professionals throughout the country are familiar with these preferred procedures, the most common of which, percutaneous central line placement, utilizes a hollow needle and a wire to secure access. Because percutaneous techniques are far less invasive, they carry none of the risks of the cut-down procedure, and are far less painful, less traumatic, and easier for the physician to master. As a result, "[p]ercutaneous alternatives should be

exhausted or prohibited prior to contemplating a peripheral cutdown." Bruce B. McIntosh, MD, and Scott A. Dulchavsky, MD, *Peripheral Vascular Cutdown*, 8 (4) CRIT. CARE CLIN. 807, 808 (1992).

3. The Record Fails To Show That A Suitable Plan Is In Place Or That Appropriate Alternatives Have Been Considered

While the record shows that Nelson requested the State's plan for addressing Nelson's condition, and asked that it consider alternatives to the cut-down procedure, the record strongly suggests that no suitable plan exists and that no such consideration was given. The Warden's affidavit explains clearly that the State's plan, which does not include percutaneous central line placement, was conceived after Nelson brought the instant litigation, and that as yet unnamed medical personnel are prepared to carry out the procedures. J.A. 90-91.

There is nothing in this record that suggests that percutaneous central line placement would fail. Given this fact, there is no medical reason to utilize the significantly more dangerous cut down procedure.[7]

[7] "A peripheral venous cutdown is not the primary consideration in most patients who require vascular access. It is specifically indicated, however, in patients who lack adequate peripheral access *and* who are *not candidates for percutaneous central venous access.*" Bruce B. McIntosh, MD, and Scott A. Dulchavsky, MD, *Peripheral Vascular Cutdown*, 8 (4) CRIT. CARE CLIN. 807, 807 (1992) (emphasis added). "*If an intravenous line cannot be established percutaneously*, and *if a subclavian (or internal jugular) catherization is not appropriate* to the clinical situation, a venous cutdown is indicated . . . ." Sam C. Eggertsen, MD, *Teaching Venous Cutdown Techniques with Models*, 16 (6) J. FAM. PRACT. 1165, 1165 (1983) (emphasis added). "Venous cut down is an emergency procedure . . . [and an] effective option for venous access in multisystem trauma and hypovolemic shock, *when peripheral cannulation becomes difficult or impossible*." *Venous Cut Down: A Quicker and Safer Technique* (visited Jan. 20, 2004), The Royal College of Surgeons, Surgical Knowledge and Skills Website <http://www.edu.rcsed.ac.uk/operations/op4.htm> (emphasis added).

4. The Record Does Not Establish That Dr. Sonnier Is Competent To Perform Cut-Down

Finally, while the Warden did not confirm that Dr. Sonnier would supervise or conduct the invasive procedures outlined in their affidavits, we note that there are significant reasons to question whether Dr. Sonnier possesses the requisite experience and training adequately and safely to perform a cut-down procedure. At no point does he describe his background and training in sufficient detail to establish that he possesses such training and experience. Our confidence in his experience is not strengthened by his claim that he has previously attached an intravenous line "to the external carotid vein located in the neck," and his assertion that the saphenous vein is in the arm. J.A. 91. Humans do not have an external carotid vein in their neck nor a saphenous vein in their arm. GRAYS ANATOMY, at 816-26; 845-50 (Carmine D. Clemente ed., 30th ed. 1984). Further, it appears that it was the Warden, and not Dr. Sonnier, who determined the procedures that would be used. The selection of a method to gain access to a non-compromised vein should be made by the doctor, and only after he or she has performed a full examination of the patient. There is no evidence that Dr. Sonnier has performed such an examination.

Conclusion

If a special medical procedure is necessary to locate a functional vein, the procedure should comply with accepted medical practice. The deficient plan proposed by the State of Alabama in this instance falls far short of those practices.

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No. 03-6821

IN THE

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DAVID LARRY NELSON,

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vs.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a complaint brought under 42 U. S. C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U. S. C. § 2254.

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IN THE

Supreme Court of the United States

DAVID LARRY NELSON,

Petitioner,

vs.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In 1996, Congress enacted a landmark reform of the law of habeas corpus, the Antiterrorism and Effective Death Penalty Act of 1996, to curb the rampant abuses that had occurred up to

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

that time, particularly in capital cases. Petitioner in this case seeks to evade the limitations imposed by Congress merely by captioning his pleading as a civil rights complaint instead of a habeas petition. Such evasion is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioner David Nelson is sentenced to death for his third murder.

> "On August 28, 1974, David Larry Nelson, the appellant, pleaded guilty to murder in the second degree for the murder of Oliver King. The Circuit Court of Jefferson County, Alabama, sentenced Nelson to twelve years imprisonment.
>
> "In 1977, after serving six years of the twelve-year sentence, including pretrial time, Alabama prison officials released Nelson. On December 31, 1977, Nelson murdered James Dewey Cash during the course of a robbery. *Nelson v. State*, 452 So. 2d 1367 (Ala. Crim. App. 1984). A few hours later, on January 1, 1978, Nelson murdered Wilson W. Thompson. The facts of the Thompson murder are set forth in *Nelson v. State*, 511 So. 2d 225 (Ala. Crim. App. 1986)." *Nelson* v. *Nagle*, 995 F. 2d 1549, 1551 (CA11 1993) (*per curiam*).

Nelson has been sentenced to death three times for murdering Mr. Thompson. See *Nelson* v. *Alabama*, 292 F. 3d 1291, 1293-1294 (CA11 2002).

Effective July 1, 2002, the State of Alabama changed its method of execution from electrocution to lethal injection. Previously sentenced inmates had until 30 days from that date to elect electrocution rather than injection. Ala. Code § 15-18-82.1(b). Petitioner did not make this election. See Brief for Petitioner 5, n. 3.

On September 3, 2003, the Alabama Supreme Court set an execution date of October 9, 2003. Brief for Petitioner 5. At about that time, petitioner and his counsel became aware that the state might find it necessary to use a surgical procedure to gain access to a vein for the lethal injection.

On October 6, 2003, three days before the scheduled execution, Nelson filed a civil rights suit under 42 U. S. C. § 1983 in the United States District Court for the Middle District of Alabama. J. A. 5-23. The complaint alleged that the state's actions and proposed actions violated both state law and the Eighth Amendment. J. A. 21. The complaint did *not* allege that either claim had ever been presented to any state court or that state remedies were absent or ineffective. See also J. A. 102-103 (amended complaint).

The District Court granted the defendants' motion to dismiss the next day. J. A. 116-117. The Court of Appeals affirmed, finding that the complaint was the functional equivalent of a habeas petition and did not meet the requirements for a successive petition under 28 U. S. C. § 2244(b)(2). J. A. 121. On October 9, the Court of Appeals denied rehearing en banc. J. A. 129-130.

The same day, *i.e.*, the day scheduled for the execution, Nelson filed two motions with the Alabama Supreme Court. One was titled "Motions to Require Medically Acceptable and Constitutional Procedure Prior to Execution." This motion is reproduced in Appendix A to this brief, except that most of Part II, the Statement of Facts, is omitted. The statement is largely the same as the federal court complaint. The other motion was for stay of execution.

Also on October 9, Nelson filed with this Court a petition for writ of certiorari to the Eleventh Circuit and an application for stay. The application for stay was granted. J. A. 131. The Alabama Supreme Court then denied the motion for stay before it as moot, and it simply denied the substantive motion. This order is reproduced as Appendix B to this brief. This Court

granted certiorari on December 1, 2003, restating the question presented. J. A. 132-133.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1871, now codified at 42 U. S. C. § 1983, may not be used to circumvent the limitations placed on habeas corpus by the Congress and by this Court's precedents. *Preiser* v. *Rodriguez* settled that when the relief sought is within the scope of habeas corpus, that procedure is exclusive. If the limitations placed on habeas preclude relief, § 1983 cannot be used to obtain what Congress has decided to deny.

Shorthand references in noncapital cases to the scope of habeas as "the fact and duration of confinement" are not controlling. The underlying principle is that the habeas remedy is exclusive for claims within its scope. Habeas is well established as the proper procedure for penalty phase and method of execution claims going back over a century, even though neither type of claim seeks to shorten the duration of confinement.

In addition, under the doctrine of *Younger* v. *Harris*, § 1983 may not be used to interfere with the execution of a state judgment unless state remedies for a constitutional violation are absent or ineffective. Where state law on the existence of remedies is unclear, the complaining party must ask the state courts first. Nelson did not do so, and his complaint was subject to dismissal under *Younger*.

Recharacterization of pleadings is an irregular but necessary practice in cases with *pro se* litigants. It should never be done in the case of a represented party. All of the reasons for recharacterizing pleadings can be met as well by giving counsel leave to amend, in circumstances where the governing rules and statutes permit amendment. If counsel will not amend an improper pleading, or if the governing law does not permit amendment, it should be dismissed.

In the present case, the § 1983 complaint could not have been saved by amending it to a habeas petition. The requirement of exhaustion of state remedies had not been met. The complaint was properly dismissed.

ARGUMENT

I. The Civil Rights Act may not be used to circumvent Congress's limits on habeas corpus.

A. The Specific and the General.

This case brings the Court once again to the well-traveled intersection between the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the federal habeas corpus statute for state prisoners, 28 U. S. C. § 2254. See *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994); *Preiser* v. *Rodriguez*, 411 U. S. 475, 482-483 (1973). The rule of the road is well established that habeas corpus, as the more specific of the two, has the right-of-way at this crossing, *i.e.*, it "must be understood to be the exclusive remedy available in a situation like this where it so clearly applies." *Preiser*, *supra*, at 489. Little more than reaffirmation of this principle is needed to answer the question presented in this case.

Federal court litigation by state-court criminal defendants has long raised delicate questions of federalism. See, *e.g.*, *Ex parte Royall*, 117 U. S. 241, 252 (1886) (habeas); *Fenner* v. *Boykin*, 271 U. S. 240, 244 (1926) (civil rights); *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951) ("special delicacy"). Both the habeas statute and the Civil Rights Act require striking a balance between the need to protect federal rights from state action and the need to avoid undue interference in the state's administration of its own laws. For the Civil Rights Act, these needs are accommodated through several doctrines of "abstention," the most important of which is discussed further in Part II, *infra*. However, the problem has received more attention both from this Court and from the Congress in the area of

habeas corpus, because federalism is implicated in every § 2254 case, not just occasionally as it is in § 1983 litigation. This greater attention has resulted in a more developed body of law, with a finely crafted set of rules defining the limits of federal court action. Particularly where Congress has balanced the interests and defined the limits, courts and litigants must not be permitted to evade those limits and upset that balance simply by attaching a different label. See, *e.g.*, *Calderon* v. *Thompson*, 523 U. S. 538, 553 (1998) (successive petition limits apply to motion to recall mandate, to preclude evasion).

The plaintiffs in *Preiser* had lost good time credits in prison discipline proceedings and sought to challenge those proceedings in Federal District Court in § 1983 actions, combined with habeas corpus petitions. See 411 U. S., at 476-482. The relief they sought was release from confinement. See *id.*, at 487. Court of Appeals panels in two of the three cases held that the cases were habeas petitions, not civil rights actions, and as such had to be dismissed for nonexhaustion. See *id.*, at 479-480. These decisions were reversed en banc. See *id.*, at 482. This Court reversed in turn.

Preiser discusses the scope of habeas corpus and the relief available under it as that procedure had evolved through the time of the decision, not just the very limited review of jurisdiction of the committing court available in the early 1800s. See *id.*, at 484-486. "In the case before us, the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus." *Id.*, at 487. If they succeeded, they would be released from custody earlier, the relief typically available in habeas. Again, the word "traditional" in this passage includes modern expansions of the scope of habeas. See *id.*, at 487-488. The *Preiser* Court rejected the position of the dissent that the Civil Rights Act should reach wherever habeas relief would not have been available in times past. See *id.*, at 488, n. 8.

The broad language of the Civil Rights Act, applicable to the case on its face, was not conclusive. *Preiser* held that the Civil Rights Act could not be used where the subject matter of

the suit was so clearly within the scope of "the *specific* federal habeas corpus statute." *Id.*, at 489 (emphasis added). This conclusion was based squarely on the need to prevent evasion of congressional limits on habeas, of which exhaustion was the most important at that time. "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings." *Id.*, at 489-490. Although *Preiser* speaks in terms of the exhaustion requirement and attacks on the fact and length of confinement, its underlying principle is somewhat broader. If the relief sought is the type of relief for which Congress has provided habeas corpus, then the Civil Rights Act must not be used to evade the limitations that Congress has placed on habeas and upset the balance that Congress has struck. It is no answer to say that this particular plaintiff cannot actually obtain relief on habeas. The *Preiser* plaintiffs could not, because they had failed to exhaust state remedies. If Congress has decided that habeas relief should not extend to a prisoner in the petitioner's circumstances, that is precisely the policy determination that the courts must respect and not evade through the Civil Rights Act. See *id.*, at 490.

The rule of *Preiser* that the specific statute, with its limitations, controls in the area where the specific and general statutes overlap is simply one application of a well-established principle. *Brown* v. *GSA*, 425 U. S. 820 (1976) illustrates the breadth of this principle. Congress had provided a remedy for discrimination claims by federal employees in 42 U. S. C. § 2000e-16. The plaintiff missed the deadline for judicial review of the administrative determination of his claim, and he tried to evade that requirement by invoking the general employment discrimination statute. See 425 U. S., at 823-824. Quoting *Preiser*, *Brown* held that the balance struck by Congress could not be evaded merely by attaching a different label. *Id.*, at 832-833. "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful

pleading." *Id.*, at 833. "In a variety of contexts the Court has held that a precisely drawn, detailed statute preempts more general remedies." *Id.*, at 834 (citing cases on Federal Tort Claims Act, Suits in Admiralty Act, and venue requirements in patent cases).[2] A specific remedy may be cumulative rather than exclusive when the language or history of the statute indicates that intent, see *id.*, at 833-834, but neither the habeas statute in *Preiser* nor the employment statute in *Brown* fell in that category. See *id.*, at 835. In each case, the specific remedy was exclusive, and the plaintiff could not invoke the general one, even though the specific one was no longer available to him. See *id.*, at 835.

B. Habeas and Method of Execution.

Under *Preiser*, the threshold question in determining whether a § 1983 action is cognizable is simply one of whether the claim lies within the scope of habeas corpus. Although the use of habeas to litigate method of execution claims "may lack a perfect historical pedigree," cf. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) (cause and prejudice test for procedural default), it is well established at this point. In the usual habeas case, the prisoner is contending that he should not have been convicted at all, and hence should not have been imprisoned at all, or else that his sentence of incarceration is too long and he should be released sooner. Hence, the dispute is typically stated as a challenge to the fact or duration of confinement. See, *e.g.*, *Porter* v. *Nussle*, 534 U. S. 516, 527 (2002); see also *Muhammad* v. *Close*, 540 U. S. __ (No. 02-9065, Feb. 25, 2004) (slip

2. *Heck* v. *Humphrey*, 512 U. S. 477 (1994) and *Edwards* v. *Balisok*, 520 U. S. 641 (1997) extended *Preiser* to situations where a plaintiff did not seek a form of relief cognizable in habeas corpus, but sought money damages on a theory that implied invalidity of the conviction or loss of good-time credits. These cases are only tangential, as is *Muhammad* v. *Close*, 540 U. S. __ (No. 02-9065, Feb. 25, 2004), while *Preiser* is on point, for reasons which we understand will be discussed in the Respondent's Brief and need not be repeated here.

op., at 1) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . "). In challenges to the penalty phase of a capital case, the prisoner is contending that he *should* have been sentenced to life in prison, and so in a sense it is the prisoner who is arguing for a *longer* confinement than the state wishes to impose. Even so, penalty phase claims have been routinely reviewed on habeas throughout the modern capital punishment era. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 695 (1984). Congress enacted its most recent reforms of habeas corpus with capital cases as its central focus, see 141 Cong. Rec. 15,018 (1995) (statement of Sen. Specter), and it did not eliminate the penalty phase litigation, so it must have intended that this practice continue.

Review of method of execution on habeas goes back at least to *In re Kemmler*, 136 U. S. 436 (1890), an Eighth Amendment challenge to electrocution. The Court denied an application for writ of error because the decision below was "so plainly right," *i.e.*, on the merits, without any hint that habeas was an incorrect procedure. *Kemmler* arose on state habeas, so the Court would not necessarily have commented on the procedure if the state courts did not, but the same year the Court denied federal habeas on the same ground in *Jugiro* v. *Brush*, 140 U. S. 686 (1890). The Court summarily affirmed by citing *Kemmler*, a merits decision. In the modern era, *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 653 (1992) (*per curiam*) clearly contemplates that habeas is available for a method of execution claim, and at least hinting if not holding that habeas is the exclusive remedy. In *Stewart* v. *LaGrand*, 526 U. S. 115 (1999) (*per curiam*), a method of execution claim was decided on habeas on the basis of well-established habeas doctrine, with no question of the applicability of the procedure. See *id.*, at 119 (citing *Teague* v. *Lane*, 489 U. S. 288 (1989) and *Coleman* v. *Thompson*, 501 U. S. 750 (1991)). Of course, the unexplained and unchallenged exercise of jurisdiction does not form a precedent which is binding in a case where the question is squarely presented, see *Lewis* v.

Casey, 518 U. S. 343, 352, n. 2 (1996), but the long and unbroken history of the exercise of this jurisdiction does at least illustrate that method of execution claims are established and accepted as being within the scope of habeas corpus.

As *Preiser* and *Brown* illustrate, the dispositive question is whether claims of this type are within the scope of the more specific remedy, not whether this particular plaintiff can actually obtain relief or even a decision on the merits. Challenges to the method of execution are within the scope of habeas corpus, and the question of whether Nelson can receive a federal court determination of the merits of his claim therefore depends on the interpretation of the federal habeas statute. As discussed further in Part III, *infra*, the answer to the question presented in this case does not depend on the answer to the successive petition riddle.

II. The Civil Rights Act cannot be used to interfere with ongoing state-court proceedings, except in rare cases.

Aside from the exclusivity of the habeas remedy, there is a second, independent reason why 42 U. S. C. § 1983 cannot be used in this case. With rare exceptions, § 1983 cannot be used to interfere with ongoing state-court proceedings, under the rule commonly known as the *Younger* abstention doctrine. "[O]ur cases . . . repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger* v. *Harris*, 401 U. S. 37, 45 (1971).

In *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994), the Court noted, "In general, exhaustion of state remedies 'is *not* a prerequisite to an action under § 1983,' *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 501 (1982) (emphasis added) . . . ." The qualifier "in general" is a significant modification of the actual language of *Patsy*, which said "categorically." In cases subject to the *Younger* doctrine, there *is* an exhaustion requirement.

The doctrine now called *Younger* actually goes back at least as far as *Fenner* v. *Boykin*, 271 U. S. 240 (1926). See *Younger*, 401 U. S., at 45 (quoting *Fenner*). The *Fenner* plaintiffs asked for an injunction against a threatened state prosecution for the crime of trading commodities futures, asserting that the statute was unconstitutional. See *Fenner*, *supra*, at 242-243. The Court noted that under *Ex parte Young*, 209 U. S. 123 (1908), the federal court had the power to do so. "But this may not be done except under extraordinary circumstances . . . . The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that this course would not afford adequate protection." 271 U. S., at 243-244. In modern parlance, he must exhaust state remedies.

In *Fenner* the state proceedings were merely threatened, not yet commenced. *Younger* dealt with a situation where "a proceeding was already pending in the state court," 401 U. S., at 49, which calls for even greater restraint. Compare *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974) (declaratory relief available for threatened prosecution), with *Samuels* v. *Mackell*, 401 U. S. 66, 73-74 (1971) (not available for pending state prosecution). The key questions under *Younger* are whether a state proceeding is pending and whether the plaintiff has qualified for an exception.

Huffman v. *Pursue, Ltd.*, 420 U. S. 592 (1975) addressed the application of *Younger* to an injunction against enforcement of a judgment after the state-court trial. The local authorities had brought a nuisance action in state court and obtained a judgment closing the defendant's pornographic theater for a year. *Id.*, at 595-598. Defendants did not appeal. *Id.*, at 598. The Federal District Court enjoined execution of the closure order in part. *Id.*, at 599.

This Court rejected the argument that *Younger* did not apply because the state-court judgment was final, and hence no proceeding was pending. "[A] necessary concomitant of *Younger* is that a party in appellee's posture *must exhaust* his state appellate remedies before seeking relief in the District

Court, unless he can bring himself within one of the exceptions specified in *Younger*." *Id.*, at 608 (emphasis added).

Juidice v. *Vail*, 430 U. S. 327 (1977) is procedurally quite similar to the present case. Vail did not challenge the validity of the underlying money judgment against him, but rather attacked the constitutionality of using contempt orders to enforce such judgments. He made this claim in a § 1983 action without ever raising it in any state court. See *id.*, at 330. "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." *Id.*, at 337 (emphasis in original, footnote omitted).

Under *Huffman* and *Juidice*, then, *Younger* is not strictly limited to "pending" state proceedings in the narrow sense. References to a distinction between pending and non-pending cases must be understood in the context of the *Samuels/Steffel* distinction between cases that have *begun* and those that have not. *Younger* applies to any federal court interference with a state court case after its commencement, including interference with the execution of the judgment when no further appeals are available.

The present case is even more straightforward than *Huffman* and *Juidice*, because there was a pending state proceeding in the usual sense. In the present case, the actual execution date was set by order of the Alabama Supreme Court. See Brief for Petitioner 5. When an objection to the method of execution arises after the trial and appeal, the "most propitious" forum for making the objection is the court setting the execution date. Cf. *Juidice*, 430 U. S., at 337, n. 14.

Nelson did, in fact, file such an objection in the Alabama Supreme Court, but only after both the Federal District Court and the Court of Appeals had ruled against him on the § 1983 action. On October 9, 2003, Nelson filed two motions, one for a stay of execution and one titled "Motion to Require Medically Acceptable and Constitutional Procedure Prior to Execution."

The latter pleading is reproduced in part in Appendix A. The factual allegations are omitted, because they are substantially the same as those made in the federal court.

This motion is clearly made in the context of an ongoing proceeding, not the initiation of a new case. In both caption and text, the State is referred to as the "Movant" while Nelson is the "Respondent." The case number is the same as the direct appeal. See *Nelson* v. *State*, 681 So. 2d 252, 252, n. * (Ala. Crim. App. 1995); *In re Nelson*, 681 So. 2d 260 (Ala. 1996).

The Alabama Supreme Court's disposition of the motions is reproduced in Appendix B. It presents the interpretational difficulties common to summary dispositions, cf. *Coleman* v. *Thompson*, 501 U. S. 722, 727, 744 (1991), but it does seem to imply that Nelson's motion was procedurally proper, although substantively without merit. The court denied the motion for stay as moot after this Court's stay and grant of certiorari prevented execution on the date scheduled. The substantive motion is simply denied, with no indication it was procedurally improper.

Despite Nelson's evident belief in the procedural propriety of this motion, the Eighth Amendment is conspicuously absent from it. Nelson asked the Alabama Supreme Court to forbid the procedure in question on the ground that it "violates the prohibition against the infliction of cruel and unusual punishments in violation of Article I, Section 15 of the Constitution of the State of Alabama." *Infra*, at A-2. For whatever reason, Nelson has made a deliberate choice *not* to present his federal claim to an available state forum in which the proceeding was pending. *Juidice* holds quite expressly that this is sufficient to preclude his § 1983 action under *Younger*, unless an exception applies.

"*Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by

a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973). Thus, the federal suit may proceed if the state tribunal is "incompetent by reason of bias to adjudicate the issues pending before it." *Ibid.* This exception does not apply, however, if the party merely believes that the state court is a less hospitable forum. See *Huffman*, 420 U. S., at 610-611.

The "timely decided" aspect raises a potentially thorny problem in capital cases. On the one hand, a state court which refused to grant a stay to consider a potentially meritorious claim unavoidably raised late in the proceedings would not be providing the opportunity that *Younger* envisions. On the other hand, state courts as well as federal should emphatically reject the cynical manipulations all too often employed by capital defense counsel, as exemplified in the Robert Alton Harris execution at issue in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992). In that case, a challenge to the standard method of execution which had been in use for decades was deliberately withheld through multiple rounds of litigation, including an appeal, nine state habeas petitions, and four federal habeas petitions, only to be filed in a civil rights suit a few days before the scheduled execution. See *id.*, at 653 (four prior federal habeas); Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 322 (1992) (chronology, noting nine state habeas petitions, execution date set for April 21, 1992, civil rights suit filed April 17). "There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez*, *supra*, at 654. Congress was keenly aware of the Harris case when it enacted the Antiterrorism and Effective Death Penalty Act of 1996. The bill's supporters cited the case repeatedly as an example of the abuse they intended to stop. See, *e.g.*, 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein); *id.*, at 15,019 (statement of Sen. Specter).

A state court remedy is not ineffective or unavailable if the court denies a stay on the same basis that this Court vacated the stay in *Gomez*. The precise boundary need not be drawn in the present case, because Nelson never presented his federal claim to the state courts at all, not even in the motion filed *on* the execution date.

The issue of unavailability of a stay as a ground for the inadequacy exception to *Younger* was presented in *Pennzoil Co.* v. *Texaco, Inc.*, 481 U. S. 1 (1987). The Texas state courts had rendered a large money judgment against Texaco, and the appeal statute required a bond for a stay pending appeal. As applied to the case, the bond requirement was impossible. See *id.*, at 4-5. Without ever presenting a federal claim to the state courts, Texaco filed a § 1983 action to enjoin enforcement of the judgment. *Id.*, at 6.

This Court held that *Younger* abstention was required. The would-be federal plaintiff cannot simply assume that the state courts would not grant relief "within the limited time available" in the unusual circumstances of the case. "[T]he burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.' " *Id.*, at 14 (quoting *Moore* v. *Sims*, 442 U. S. 415, 432 (1979)).

Of course, a showing by citation of precedents may not be possible if there is no precedent on point and state law is unclear. The clear alternative in cases of unclear state law is simply to ask the state court first, and to do so as far in advance of the execution date as possible. "We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Id.*, at 15. Failure to do so in the absence of good cause is a species of procedural default. "Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Ibid.*

The *Younger* doctrine and the habeas corpus statute are substantially the same on this point. Exhaustion of state remedies is generally required, but it is excused if those remedies are absent or ineffective. See 28 U. S. C. § 2254(b)(1)(B). Regardless of whether this case is a habeas case or a § 1983 action, Nelson has neither exhausted state remedies nor carried his burden of showing they are inadequate or ineffective. Whatever it is called, the case was correctly dismissed.

III. Pleadings of represented parties should never be recharacterized, and especially not when relief cannot be granted.

The question presented in this case, as framed by the Court, is whether an execution procedure challenge filed under 42 U. S. C. § 1983 "is properly recharacterized as a habeas corpus petition under 28 U. S. C. § 2254." See *supra*, at i. *Amicus* CJLF submits that an improper pleading by a *represented* party should never be recharacterized by the court. If counsel cannot or will not amend it, it should be dismissed.

The Court has already addressed recharacterization once this term, in *Castro* v. *United States*, 540 U. S. __ (No. 02-6683, Dec. 15, 2003). *Castro* involved a federal prisoner and a pleading recharacterized as a motion under 28 U. S. C. § 2255, but for this purpose there is no difference between § 2255 and federal habeas petitions by state prisoners. Justice Scalia, concurring in part and concurring in the judgment, was leery of recharacterization as a "departure from our traditional adversarial principles." *Castro*, *supra* (slip op., at 3). The majority notes that it is "longstanding practice," *id.* (slip op., at 1), but only for *pro se* prisoners.

No death row prisoner need ever appear *pro se* in federal habeas. See 21 U. S. C. § 848(q)(4)(B). The special latitude for *pro se* habeas petitions that is the source of the recharacterization practice, see *Castro*, *supra* (slip op., at 2)

(opinion of Scalia, J.), is therefore inapplicable. It certainly does not apply to the present case. Petitioner Nelson was at all relevant times represented by counsel. See Brief for Petitioner 5-9.

A recharacterization is, in essence, an amendment of the party's pleading by the court. Amendment of pleadings is governed by Federal Rule of Civil Procedure 15 in both civil cases and habeas corpus. See 28 U. S. C. § 2242. That rule provides for parties to amend their own pleadings. Leave of the court or consent of the adverse party is sometimes required, Fed. Rule Civ. Proc. 15(a), but there is no provision for the court itself to amend the pleading. The normal mode of dealing with a fatally defective pleading is to dismiss it. See, *e.g.*, *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 31 (1989). In some cases, dismissal may be with leave to amend. See, *e.g.*, *Denton* v. *Hernandez*, 504 U. S. 25, 34 (1992).

Castro gives three reasons for recharacterizing the pleading of a *pro se* litigant: "to avoid an unnecessary dismissal, . . . , to avoid inappropriately stringent application of formal labeling requirements, . . . , or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis." Slip op., at 6. For represented litigants, each of these purposes is accomplished just as well by granting leave to amend where the applicable rules and statutes allow it. Where they do not, it is because Congress has made a policy choice not to allow it, a choice which a court ought not circumvent by doing itself what the law does not allow the party to do. Cf. *Calderon* v. *Thompson*, 523 U. S. 538, 553 (1998).

For the reasons explained in Part II, *supra*, Nelson's § 1983 complaint violated the rule of *Younger* v. *Harris*, 401 U. S. 37 (1971). The case law is quite clear that a complaint which runs afoul of *Younger* must be dismissed. See *Edwards* v. *Balisok*, 520 U. S. 641, 649 (1997).

For the reasons explained in Part I, *supra*, the complaint is also contrary to the rule of *Preiser* v. *Rodriguez*, 411 U. S. 475

(1973). In some circumstances, it may be proper to allow the represented party to avoid dismissal under *Preiser* by amending the complaint to transform it into a habeas petition. This is not such a case.

In *Castro*, Justice Scalia noted that a *pro se* litigant's pleading should not be recharacterized "when there is nothing whatever to be gained by the recharacterization." Slip op., at 4 (emphasis omitted). That is the case here. At least one of the requirements for habeas relief is glaringly absent: exhaustion of state remedies. Not only did Nelson make no effort to give the state courts the first opportunity to address his federal claim, as federal law has long required, see *Preiser*, 411 U. S., at 490-492, he deliberately withheld the federal claim from the pleading that he did file in state court. See Appendix A.

Having made no attempt to exhaust state remedies, and having made no showing that state remedies were absent or ineffective, Nelson is categorically barred from relief on the merits in habeas corpus. See 28 U. S. C. § 2254(b)(1). Nelson is in the same position as Katzoff in the *Preiser* case, whose complaint the Court of Appeals panel correctly held should have been dismissed. See 411 U. S., at 480-481. Recharacterization and leave to amend would be equally pointless when the statute forbids relief.

The parties debate whether a habeas petition would be barred as successive, offering differing interpretations of *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998). The answer to the question presented does not depend on the resolution of that debate. Because the § 1983 action is precluded by both *Preiser* and *Younger*, and habeas relief is precluded by the exhaustion rule, dismissal of the action was the correct response, whether the reason given for it was correct or not.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

March, 2004

Respectfully submitted,

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No. 1860528

SUPREME COURT OF ALABAMA

State of Alabama,
Movant

v.

David Larry Nelson,
Respondent.

MOTION TO REQUIRE MEDICALLY ACCEPTABLE AND CONSTITUTIONAL PROCEDURE PRIOR TO EXECUTION

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MOTION FOR EXTRAORDINARY RELIEF OF POSTPONEMENT OF EXECUTION

Now comes, Respondent David Larry Nelson, by and through undersigned counsel, who hereby moves this Court to require the State follow a medically acceptable and constitutional procedure prior to the execution of David Larry Nelson and shows the following:

I. INTRODUCTION

The Respondent is scheduled to be executed by lethal injection at 6:00 p.m. on October 9, 2003 at William C. Holman Correctional Institute in Atmore, Alabama. As the Movant has conceded, due to the Respondent's severely compromised veins, the Movant will have to perform a medical procedure as a predicate to the legal procedure of execution by lethal injection in order to gain venous access. (Paragraph 2 of the Affidavit of Grantt Culliver, attached hereto as Attachment 1). Although the Movant refuses to release any written protocol promulgated by the State of Alabama regarding the procedures to be followed in performing this medical procedure and/or the qualifications of the person(s) responsible for performing this medical procedure, the Movant has provided the Respondent with a crude description of the procedure it intends to follow.

The medical procedure that the Movant intends to perform on the Respondent as a predicate to the legal procedure of execution by lethal injection is an outdated, barbaric method that does not comport with contemporary medical care standards and that violates the prohibition against the infliction of cruel and unusual punishments in violation of Article I, Section 15 of the Constitution of the State of Alabama. *See Hocker v. State*, 840 So.2d 197 (Ala.Crim.App. 2002).

The Movant has been informed of the substantial risks of inflicting unnecessary and wanton pain, if not torturous death, with the implementation of its chosen outdated method of gaining venous access, particularly given the fact that it will be

performed in a non-medical setting where proper drugs and proper medical equipment are not readily accessible. The Movant furthermore has been informed of a more modern, alternative medical procedure for gaining venous access that has supplanted the Movant's chosen outdated method, that comports with contemporary medical standards of care, and that does not violate the prohibition against cruel and unusual punishments. However, the Movant continues to show deliberate indifference to the known substantial risks.

As is set forth below, the relief sought is appropriate given the procedure the Movant intends to utilize prior to the Respondent's execution. As is more fully described below, there does exist a humane medical procedure to gain venous access to the Respondent that does not run afoul of the prohibition against cruel and unusual punishment under the Constitution of the State of Alabama.

It should be emphasized that the Respondent is not challenging his conviction or sentence of execution by lethal injection. Rather, he only seeks the relief of postponement of the legal procedure of execution by lethal injection until the Movant establishes by way of a written protocol that it will employ a humane medical procedure to gain venous access as a predicate to the legal procedure of execution by lethal injection that complies with Article I, Section 15 of the Constitution of the State of Alabama.

II. STATEMENT OF FACTS

[Part II omitted, except for last paragraph.]

Failure to provide relief will result in irreparable harm in that the Movant will perform the above-described cut-down procedure on the Respondent prior to his execution which is scheduled for 6:00 p.m. Central Time on October 9, 2003. Since the Respondent has been informed that he will be allowed to receive visitors only until 4:00 p.m. Central Time on October 9, 2003, the Respondent believes that the Movant may perform

the medical procedure that violates the Respondent's rights as guaranteed by Article I, Section 15 of the Constitution of the State of Alabama as early as 4:01 p.m. Central Time on October 9, 2003.

III. RELIEF SOUGHT

Wherefore, the Respondent seeks that this Court enter an Order which requires a medically acceptable and constitutional procedure prior to the Movant's execution which is currently scheduled at 6:00 p.m. Central Time on October 9, 2003. The Respondent believes that the Movant may perform the medical procedure that violates his rights as early as 4:01 p.m Central Time. As such, the Respondent respectfully requests that this Court enter its Order by prior to 4:00 p.m. Central Time on October 9, 2003.

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IN THE SUPREME COURT OF ALABAMA
October 9, 2003

1860528

Ex parte David Larry Nelson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(In re: David Larry Nelson v. State of Alabama)
(Jefferson Circuit Court: CC-78-1115; Criminal Appeals: 6/892, CR-93-2095).

ORDER

The petitioner, David Larry Nelson, having filed a motion for stay of execution and a "motion to require medically acceptable and constitutional procedure prior to execution" in this case, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion for stay of execution is denied as moot.

Houston, See, Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

IT IS FURTHER ORDERED that the "motion to require medically acceptable and constitutional procedure prior to execution" is denied.

Houston, See, Lyons, Brown, Harwood, Woodall, and Stuart, JJ., concur.

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

(10)

No. 03-6821

IN THE

Supreme Court of the United States

DAVID NELSON,

Petitioner,

v.

DONAL CAMPBELL, Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF SENATOR ORRIN G. HATCH AND CONGRESSMAN TOM DeLAY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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March 3, 2004

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QUESTION PRESENTED

Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

This case raises important questions regarding the constitutional power of Congress to limit the jurisdiction of the lower federal courts to grant relief on second or successive habeas corpus petitions. *Amicus* Senator Orrin Hatch was the primary sponsor of the habeas corpus bill in the Senate and served as Chairman of the Senate Committee on the Judiciary, the committee that had jurisdiction over the bill that became the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). He and the other *amicus* are vitally interested in seeing that AEDPA remains an effective bar to second or successive challenges to sentences. Members of Congress have participated as *amici curiae* in cases of special significance involving important issues affecting the legislative branch, including AEDPA's successive-petitions provisions, both by consent and on motion. *E.g., Felker v. Turpin*, 518 U.S. 1047 (1996); *National Org. for Women v. Idaho*, 455 U.S. 918 (1982); *United States v. Helstoski*, 442 U.S. 477 (1979).

Amici have an institutional interest in the proper application of AEDPA's finality requirements, which have been codified in 28 U.S.C. § 2244(b). Congress designed those requirements to ensure that, absent a showing of actual innocence, the lower federal courts will not have jurisdiction, or power, to grant relief over second or successive challenges to sentences based on "new facts." By merely labeling a successive challenge to his sentence—a challenge that does not allege actual innocence—a "42 U.S.C. § 1983

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was prepared in its entirety by *amici* and its counsel. No monetary contribution was made by any person other than *amici* and its counsel. Pursuant to Supreme Court Rule 37.3(a), *amici* have conferred with the parties regarding the filing of this brief *amici curiae*, and both parties have consented to its filing. Evidence of the written consent of the parties has been filed separately herewith.

claim" instead of a "habeas petition," Petitioner seeks to avoid AEDPA's bar on second or successive challenges to sentences.

Were the Court to grant such relief, it would undermine Congress' constitutional power to prescribe the jurisdiction of the lower federal courts with respect to challenges to sentences by making that power yield to the choice of prisoners as to how they label their challenges—"§ 1983" or "habeas." It is in the institutional interest of *amici* as Members of Congress to represent their views on this important issue for the Court's independent consideration.

INTRODUCTION

Amici agree with the Statement of Facts in Respondents' brief and provide only this overview of the facts and procedural history to highlight the concerns addressed in this brief.

After his release from a prison sentence for murdering Oliver King during a robbery, David Larry Nelson, a white male, murdered James Cash after stealing $20 from him, murdered Wilson Thompson, before stealing his car, and attempted to murder his fourth victim, Linda Vice, before stealing her purse. New Year's Eve, December 31, 1977, began with convicted murderer, Nelson, entering a cab with a gun—a .38 caliber pistol—and a girl—Linda Vice. At the end of the ride, Nelson stuck out his pistol, took $20 from cab driver Cash, and demanded his watch. When the independent Cash refused and grabbed the pistol, Nelson shot him in the chest and shot him again in the head, murdering him. Nelson then made his way, with Linda, to a bar. Nelson met Thompson and offered him an "orgy" with Linda if Thompson would take them to his home in his car. Arriving at 2:00 a.m., Nelson snapped at Linda to "take something off" and invited Thompson, now naked, to perform oral sex on her. As Thompson began, Nelson placed the pistol at the back of Thompson's neck and fired, murdering him. The bullet

passed through Thompson's neck and spinal cord and hit Linda's leg, causing her to scream. Nelson fired the pistol again, hitting Linda in the wrist, and fired again, grazing her head. Looking down at the bloody, terrified woman, Nelson "displayed his penis and tried to get Vice to perform oral sex upon him."

Bloody, naked, terrified, Linda fled to a nearby house where a woman took her in. A fist banged on the door. The women did not answer. They called the police, but being New Year's Eve, the police were slow to respond. The fist banged on the door for almost two hours. Finally, Nelson drove off in Thompson's car with Linda's purse. The next day, a deputy sheriff in Tennessee captured Nelson in Thompson's car with the pistol.[2]

Nelson pleaded guilty to his first murder, the murder of Oliver King, in 1974 and served a prison term.[3] Two juries convicted Nelson of his second murder, the murder of James Cash; the first sentenced him to death and the second to life in prison, with judicial approval.[4]

A jury convicted Nelson of his third murder, the January 1, 1978, murder of Wilson Thompson, which is at issue in this case, and he received a capital sentence. This murder was a capital crime because it was committed within twenty years of Nelson's conviction for the murder of Oliver King. After twenty-five years and numerous judicial proceedings, includ-

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[2] *Nelson v. State*, 511 So. 2d 225, 229-30 (Ala. Crim. App. 1986), *aff'd*, 511 So. 2d 248 (Ala. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Nelson v. State*, 405 So. 2d 392, 396 (Ala. Crim. App. 1980), *rev'd*, 405 So. 2d 401 (Ala. 1981); *Nelson v. State*, 278 So. 2d 734, 735 (Ala. Crim. App. 1973).

[3] *Nelson*, 511 So. 2d at 228.

[4] *Nelson*, 405 So. 2d 392, *rev'd*, 405 So. 2d 401, *on remand*, 405 So. 2d 401 (Ala. Crim. App. 1981); *Nelson v. State*, 452 So. 2d 1367 (Ala. Crim. App.), *cert. denied*, 452 So. 2d 1367 (Ala. 1984).

ing two convictions by juries, three sentences by juries, four sentencing hearings by judges, six reviews by state appellate courts, and six reviews by federal courts (including two habeas petitions—one in 1990 and one in 1997) Nelson's conviction and capital sentence became final for purposes of direct and collateral review on March 24, 2003, when this Court denied certiorari.[5]

Nelson does not argue that he is actually innocent. App. 70. He is represented by a team of lawyers, including leading anti-death penalty activist and capital defense lawyer Bryan Stevenson.

In July 2002, the State of Alabama joined over thirty other States in adopting lethal injection as a humane means of execution.[6] Alabama law allows death row inmates to choose

[5] *Nelson v. State*, 405 So. 2d 50 (Ala. Crim. App. 1981); *Nelson*, 511 So. 2d 225, *aff'd*, 511 So. 2d 248, *cert. denied*, 486 U.S. 1017; *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993); *Nelson v. State*, 681 So. 2d 252 (Ala. Crim. App. 1995); *Nelson v. State*, 681 So. 2d 257 (Ala. Crim. App.), *aff'd*, 681 So. 2d 260 (Ala. 1996); *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1573 (2003).

[6] Lethal injection is used by 37 of the 38 States that have capital punishment. *See* Ala. Code 1975 § 15-18-82.1 (West Supp. 2003); Ariz. Rev. Stat. Ann. § 13-704 (Rev. 2001); Ark. Code Ann. § 5-4-617 (1997); Cal. Penal Code § 3604 (2000); Colo. Rev. Stat. Ann. § 18-1.3-1202 (West Supp. 2003); Conn. Gen. Stat. § 54-100 (2001); Del. Code Ann. tit. 11, § 4209(f) (2001); Fla. Stat. Ann. § 922.105 (2001); Ga. Code Ann., § 17-10-38 (Supp. 2003); Idaho Code § 19-2716 (1997); 725 Ill. Comp. Stat. Ann. 5/119-5(a)(1) (2002); Ind. Code Ann. § 35-38-6-1 (1998); Kan. Stat. Ann. § 22-4001 (Supp. 2002); Ky. Rev. Stat. Ann. § 431.220 (2000); La. Rev. Stat. Ann. § 15:569 B (1992); Md. Code Ann., Corr. Servs. § 3-905 (1999); Miss. Code Ann. 99-19-51 (Rev. 2000); Mo. Rev. Stat. § 546.720 (2002); Mont. Code Ann. § 46-19-103 (2003); Nev. Rev. Stat. § 176.355(1) (2001); N.H. Rev. Stat. Ann. § 630:5 XIII. (1996); N.J. Stat. Ann. § 2C:49-2 (1995); N.M. Stat. Ann. § 31-14-11 (2000); N.Y. Correct. Law § 658 (2003); N.C. Gen. Stat. § 15-187 (2003); Ohio Rev. Code Ann. § 2949.22 (1997); Okla. Stat. Ann. tit. 22, § 1014 (2003); Or. Rev. Stat. § 137.473, amended by 2003 Or. Laws 103 (1999); Pa. Stat. Ann. tit. 61, § 3004 (1999); S.C. Code Ann. § 24-3-530 (Supp. 2003); S.D. Codified Laws § 23A-27A-32 (1998); Tenn. Code Ann. § 40-23-114 (2003); Tex. Crim. Proc. Code Ann. § 43.14 (1979); Utah Code Ann. § 77-18-5.5 (2003); Va. Code Ann. § 53.1-233 (2003); Wash. Rev. Code Ann. § 10.95.180 (2002); and Wyo. Stat. Ann. § 7-13-904 (2003).

electrocution or lethal injection.[7] Nelson is a long-time intravenous drug user who has had difficulty over the last two decades receiving injections into the severely compromised veins in his lower arms. App. 7, 106. With this knowledge and his extensive and recognized experience at participating in his multiple capital trials,[8] Nelson chose, by default, lethal injection as the method for his execution. He made no challenge to the method of lethal injection in July 2002.

For decades, accepted medical practice to effect an injection for general purposes was to try first to insert a needle into a vein in the patient's arm, leg, or neck. If that was unsuccessful, local anesthetic would be applied to one of these or other areas, and a one- to two-inch incision would be made to expose a vein into which a catheter could be inserted. The textbook anesthetized incision method, often called a "cutdown," is used on newborn infants and trauma patients.[9]

[7] Ala. Code § 15-18-82.1.

[8] *Nelson*, 292 F.3d at 1298 (discussing Nelson's "extensive experience in criminal trials").

[9] *See* Samuel Eric Wilson, *Cutdown Techniques* in Vascular Access: Principles and Practice 251-52 (4th ed. 2002) [hereinafter Vascular Access: Principles and Practice] ("*External Jugular Vein* . . . After the appropriate injection of local anesthetic agent, a 1- to 2-cm incision is made transversely over the visible external jugular vein, approximately 1 to 3 cm above the clavicle . . . *Internal Jugular Vein* . . . A 3- to 4-cm incision is made here, approximately 2 cm above the clavicle. . . .*Cephalic Vein* . . . The usual location for the cephalic [upper arm] vein cutdown is in the deltopectoral groove. . . . *Saphenous Vein* . . . For placement of a central long-term venous access catheter or port via the lower extremity, a saphenous [leg] vein cutdown near the groin is performed."); N.B. Meland et al., *Saphenofemoral Venous Cutdowns in the Premature Infant*, 21 J. of Pediatric Surgery 341, 343 (1986) [hereinafter Journal of Pediatric

This "time-honored, simple surgical technique," in fact, was used on President Kennedy forty years before Nelson's scheduled execution in 2003.[10]

Fifteen months after choosing the lethal injection method, Nelson's counsel filed a challenge to the means of execution in federal district court just three days before Nelson's scheduled execution. Nelson's counsel argued that the possibility of an anesthetized incision—or "cutdown"—procedure, if a leg or neck injection could not be performed, would violate Nelson's civil right against cruel and unusual punishment. He sought a stay of execution and a different injection procedure. Nelson's lawyers, one of whom has written that AEDPA bars a challenge to the means of execution after an inmate's first habeas petition has been denied,[11] have labeled the challenge a "§ 1983 action," instead of a "habeas petition." The district court and the Eleventh Circuit stated that the "§ 1983 claim" was the "functional equivalent" of a habeas petition because it challenged a sentence—execution

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Surgery] ("This cutdown and access procedure is safe, effective, and cheaper than other central access procedures. . . . The infant can easily be held and fondled by the nurses and parents, since the intravenous lines are in a much less cumbersome position.").

[10] S. Dronen & P. Lanter, *Venous Cutdown, in* Clinical Procedures in Emergency Medicine 350 (J. Roberts & J. Hedges eds., 3d ed. 1998) [hereinafter Clinical Procedures in Emergency Medicine] (stating that a cutdown is a "time-honored, simple sugical technique"); Report of the President's Comm'n on the Assassination of President Kennedy, Appendix 8: Medical Reports from Doctors at Parkland Memorial Hospital, Dallas, Tex. p. 529 (Statement of M.T. Jenkins, M.D.) [hereinafter Warren Commission Report], *available at* http://www. archives. gov/research_room/jfk/warren_commission_report_appendix8.html ("[A] venous cutdown was performed on the right saphenous [leg] vein . . . .").

[11] Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 736-40 (2002).

by injection. App. 110, 121. Because the challenge did not involve new facts showing innocence, both courts held that it was barred by AEDPA. App. 115, 122.

SUMMARY OF THE ARGUMENT

The Constitution vests in Congress the power to determine what relief the lower federal courts may provide to state prisoners. Leading up to the passage of AEDPA, Congress conducted extensive hearings and determined that undue delays in carrying out capital sentences were occurring under the existing statutes, rules, and precedents governing federal habeas corpus petitions.

Congress was also aware that this Court had held that a prisoner could not avoid limitations on habeas petitions by labeling a challenge to his sentence a "§ 1983 claim." Immediately prior to Congress' passage of AEDPA, this Court stated that Congress should strike the balance between the interests of prisoners, on the one hand, and the interests of States and victims, on the other.

In 1996, Congress struck this balance in AEDPA by limiting the relief that the lower federal courts can provide to state prisoners. AEDPA specifically states that second or successive habeas petitions based on new facts that do not call the prisoner's actual guilt of the crime into question "shall be dismissed." Petitioner's challenge regarding new facts—the new method of execution that he chose in 2002—does not raise any issue concerning his actual guilt regarding his third and capital murder.

This Court should not allow prisoners to use labels (*e.g.*, "§ 1983 complaint") to avoid the express limitation that Congress established on the relief that the lower federal courts may provide to prisoners. Doing so would undermine the constitutional power of Congress and upset the balance of competing interests that Congress struck.

ARGUMENT

I. PURSUANT TO ITS CONSTITUTIONAL POWER, CONGRESS ENACTED AEDPA TO REDUCE DELAYS IN CARRYING OUT SENTENCES CAUSED BY THE FILING OF MULTIPLE CLAIMS IN THE LOWER FEDERAL COURTS REGARDLESS OF HOW SUCH CLAIMS ARE LABELED.

The Constitution of the United States vests Congress with the power to establish and determine the jurisdiction of the lower federal courts.[12] Congress has often exercised this

[12] The Constitution of the United States provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish.*"

U.S. Const. art. III, § 1 (emphasis added).

This Court has recognized that Congress may withdraw jurisdiction from the lower federal courts. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976) (stating that Congress' enactment of the Tax Injunction Act, 28 U.S.C. § 1341, deprived federal district courts of the power to enjoin the levy of any tax under state law where a state remedy is available and thus limited their subject matter jurisdiction); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938) (upholding Congress' enactment of the Norris-LaGuardia Act, 29 U.S.C. §§ 101–110, 113–115, which deprived federal courts of jurisdiction to issue injunctions in labor disputes). And commentators have recognized:

> [T]he widely supported conclusion: "The Constitution contains many provisions that are not at all clear. It does, however, contain a few that are clear. One of the clearest is the power of Congress to regulate the jurisdiction of [the lower federal courts]."

Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 912 (1984) (brackets by Gunther) (quoting Paul Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1030 (1982)).

power to expand and contract the jurisdiction, or power, of the lower federal courts to grant relief to prison inmates who challenge their convictions or sentences.[13] After reviewing

[13] In 1908, condemned state prisoners were abusing the then-existing version of the Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. § 766 (2d ed. 1878)), in order to forestall their executions. Section 1 authorized federal courts to review state court judgments and provided that any such judgment would be stayed automatically whenever a state prisoner filed a habeas petition until all federal proceedings had been completed. § 1, 14 Stat. 386. The result was that state prisoners could fend off execution as long as they could file a last minute habeas petition before sentence was carried out. *E.g., Rogers v. Peck*, 199 U.S. 425 (1905); *Lambert v. Barrett*, 159 U.S. 660 (1895); *In re Jugiro*, 140 U.S. 291 (1891). Concerned that condemned state inmates were frustrating the States' ability to enforce their capital sentencing laws, in 1908, Congress revised the Habeas Corpus Act of 1867 in two ways: It eliminated the automatic right to appeal the denial of a habeas petition to this Court, and it imposed the requirement, now found at 28 U.S.C. § 2253, that a prisoner obtain from this Court a certificate of probable cause to appeal. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40; *see* H.R. Rep. No. 23, 60th Cong., 1st Sess. 1-2 (1908); 42 Cong. Rec. 608-09 (1908). A certificate of probable cause thus became a jurisdictional prerequisite for appealing to this Court a circuit court's denial of a state prisoner's habeas petition. *House v. Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908); *Bilik v. Strassheim*, 212 U.S. 551 (1908). In 1925, as part of an overall modification of federal appellate jurisdiction, Congress extended the probable cause requirement to the courts of appeals. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940; *see generally Davis v. Jacobs*, 454 U.S. 911, 916-17 (1981) (opinion of Rehnquist, J.); *Jeffries v. Barksdale*, 453 U.S. 914, 915 (1981) (opinion of Rehnquist, J.). In 1948, Congress retained the probable cause requirement in 28 U.S.C. § 2253 as part of an overall modification of the Judicial Code. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179-A80 (1947); Historical and Revision Notes Following 28 U.S.C. § 2253; *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983); *Garrison v. Patterson*, 391 U.S. 464 (1968); *Carafas v. La Vallee*, 391 U.S. 234 (1968); *Nowakowski v. Maroney*, 386 U.S. 542 (1967). As this Court explained, the probable cause standard of 28 U.S.C. § 2253 "requires something more than the absence of frivolity" and also is "a higher one than the 'good faith' requirement" to proceed in forma pauperis under 28 U.S.C. § 1915." *Barefoot*, 463 U.S. at 893 (citation

the extraordinary delays in carrying out capital sentences and with knowledge of this Court's treatment of challenges to sentences labeled "§ 1983 claims" as subject to the existing limits on habeas corpus relief, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to further limit the power of the lower federal courts to grant relief to state inmates who challenge their sentences.

A. "Justice Delayed is Justice Denied."

In numerous hearings that spanned three decades, Congress examined the practice of federal courts reviewing state court judgments in capital cases.[14] Because capital litigants and

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omitted). Instead, "a certificate of probable cause requires a prisoner to make a 'substantial showing of the denial of [a] federal right." *Id.* (citation omitted).

[14] *See, e.g., Habeas Corpus: Hearings on S. 1314 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. (1976); *Federal Habeas Corpus: Hearing Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2nd Sess. (1978); *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. (1982); *Federal Criminal Law Revision, Parts 2 & 3: Hearings on H.R. 1647, et al., Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 1st and 2nd Sess. (1981 & 1982); *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st and 2nd Sess. 8 (1989 & 1990) (hereinafter "1990 Senate Hearings"); *Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st

their counsel have every incentive to delay the carrying out of the sentence by litigating the same issues more than once and by bringing certain issues to the court immediately before execution, Congress discovered numerous examples of extraordinary delays. For example, Chairman Hatch recalled:

> In Utah, we had one case that went 18 years, the ["]hi-fi murderer,["] where he and his buddy went in there, where they tortured these people, rammed pencils through their eardrums, poured Drano down their throats, and murdered them in cold blood. No question of guilt, no question of any prejudice against them, they were convicted and justly sentenced to death.
>
> Mr. President, 18 years later, 28 appeals all the way up through the State courts to the State supreme court, all the way up to the Federal courts to the Federal Supreme Court—28 appeals, millions of dollars spent before that just sentence could be carried out. And that is going on in a myriad of cases all over this country.

142 Cong. Rec. S3352 (April 16, 1996).

Cong., 2nd Sess. (1990); *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Senate Comm. on the Judiciary*, 101st Cong., 2nd Sess. (1990); *Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the Senate Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Race Claims and Federal Habeas Corpus: Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Innocence and the Death Penalty: Hearings on S. 221 Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993); *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st & 2nd Sess. (1993 & 1994); *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (hereinafter "1995 Senate Hearing").

Chairman Hyde recounted:

> John Wayne Gacy, Members must be sick of hearing his name, I see his face, because I represented where he lived and where they found 27 bodies buried in his house: 14 years and 52 separate appeals. My God, what an outrage that is.
>
> There are many cases like that. William Bonan, 16 years, guilt never in doubt; Kermit Smith, 14 years. From the time he was sentenced until he was executed, 46 different judges considered his case, and it went to the Supreme Court five different times.

142 Cong. Rec. H2248 (Mar. 14, 1996).

Senator Specter observed:

> In a context where the delays average 9 years, and in some cases go on as long as 20 years, the death penalty, which should be the flagship of the criminal justice system, has become the laughingstock of the criminal justice system, and criminals get the impression—regrettably, the accurate impression—that the law will not be carried out.

1995 Senate Hearing 7.

Senator Nickles observed:

> [S]ince his convictions, Roger Dale Stafford has made at least 18 reported appearances in Federal and State courts. He has been before the U.S. Supreme Court six times—1985, 1985, 1985, 1984, 1984, 1984—before the U.S. Court of Appeals for the 10th Circuit once, 1994, before the Oklahoma Supreme Court once, 1986, and before the Oklahoma Court of Criminal Appeals nine times, 1993, 1992, 1991, 1990, 1987, 1985, 1985, 1983, 1983. This list does not include appearances which were not officially reported. It omits one pretrial appearance at an appellate court, 1979. And, it omits all activity at the trial courts.

> Mr. President, 17 years ago he murders teenagers, he murders an innocent family that is trying to help him out, and he is still on death row.

141 Cong. Rec. S7821 (June 7, 1995). *See* 141 Cong. Rec. S7833 (June 7, 1995) (recognizing delays in carrying out capital sentences of "16 or 17 years, with the average being over 9 years[,]" and stating, "The system is drastically broken.") (statement of Sen. Kyl).

In short, Congress viewed the record of the pre-AEDPA system as regrettable proof that "Justice delayed is justice denied." 142 Cong. Rec. S3359 (Apr. 16, 1996) (statement of Sen. Hatch).

B. Prior to AEDPA, Challenges to Sentences Were Subject to Habeas Limitations Whether Such Challenges Were Labeled "§ 1983" or "Habeas."

Prior to Congress' 1996 enactment of AEDPA, this Court had occasion to address challenges to sentences by state prisoners who attempted to avoid the then-existing limitations on habeas petitions by labeling their claim a "§ 1983 claim." In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), three New York State prisoners attempted to avoid the exhaustion of state remedies requirement of the then-existing federal habeas statute by filing 42 U.S.C. § 1983 actions challenging their prison terms—their sentences. This Court stated:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. *It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings.* In short, Congress has determined that habeas corpus is the appropriate remedy

> for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

Id. at 489-90. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation . . .").

In *Gomez v. United States District Court*, 503 U.S. 653 (1992), a state prisoner, who had previously filed four federal habeas petitions, challenged his capital sentence by filing a § 1983 action claiming that the method of execution—lethal gas—was cruel and unusual punishment. The Court recognized:

> *This action is an obvious attempt to avoid the application of McCleskey v. Zant*, 499 U.S. 467 . . . (1991), [the then-existing limitation on habeas petitions] to *bar this successive claim for relief.*
>
> . . . .
>
> *Whether his claim is framed as a habeas petition or as a § 1983 action*, [the defendant] seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and [the prisoner's] obvious attempt at manipulation. . . . This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Id. at 653-54 (emphases added).

In *Lonchar v. Thomas*, 517 U.S. 314, 318 (1996), a state prisoner under a capital sentence challenged the method of execution on the "hope that the State would change the execution method to lethal injection." The Eleventh Circuit vacated the stay of execution based on jurisprudential

concerns with delay rather than based on the then-existing habeas rules. This Court vacated the Eleventh Circuit's order, reasoning that the existing rules for habeas relief for state capital prisoners, and not jurisprudential creations, governed habeas petitions:

> These legal principles [limiting habeas relief] are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a *balancing of objectives (sometimes controversial), which is normally for Congress to make*, but which courts will make when Congress has not resolved the question.
>
> . . . .
>
> But the history of the Rule makes plain that the prejudice requirement represents a critical element in *the balancing of interests undertaken by Congress* and the framers of the Rule which courts may not undermine through the exercise of background equitable powers. *See Bank of Nova Scotia v. United States*, 487 U.S. 250 . . . (1988) ("The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power'") (quoting *United States v. Payner*, 447 U.S. 727, 736 . . . (1980)).
>
> Even in an area, such as exhaustion, where judges have considerable discretionary authority, appropriate *deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.*

Lonchar, 517 U.S. at 323, 327-28 (emphases added) (final quotations omitted).

Prior to the enactment of AEDPA, this Court made clear that a challenge to a sentence, whether labeled a "§ 1983 claim" or a "habeas petition," was subject to the limitations on habeas practice and that it was appropriate for the courts to defer to Congress in balancing the interests of the state prisoner with the interests of the States in comity and victims in finality and peace. Indeed, the Court took the unusual step of including an appendix in its opinion that noted that Congress had often proposed, but had not passed, further restrictions on habeas relief. *Lonchar*, 517 U.S. at 333–34. In the twenty-three days after the Court's April 1, 1996, opinion, however, Congress passed and President Clinton signed AEDPA that provided just such additional limitations on the relief that lower federal courts can provide to state prisoners.

II. CONGRESS EXERCISED ITS CONSTITUTIONAL POWER TO PROHIBIT THE LOWER FEDERAL COURTS FROM GRANTING RELIEF TO STATE INMATES BASED ON "NEW FACTS" THAT DO NOT RELATE TO ACTUAL INNOCENCE.

Congress passed and President Clinton signed AEDPA to strike a new balance of interests to which this Court should defer in determining whether the lower federal courts can provide relief to state inmates. President Clinton stated:

> From now on criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences, and families of victims will no longer have to endure years of anguish and suffering.

Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 717, 718 (Apr. 24, 1996).

The President emphasized that the purpose of AEDPA was to "streamline Federal appeals for convicted criminals

sentenced to the death penalty." *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996).

Senator Grassley observed on the passage of the conference report of AEDPA:

> I believe that this conference report *strikes exactly the right balance on habeas corpus reform.* It provides enough in the way of habeas appeals to ensure that unjustly convicted people will have a fair and full opportunity to bring forth new evidence or contest their incarceration in numerous ways. But the conference report sets meaningful limits, which should go a long way toward eliminating many of the flagrant abuses that make a mockery of justice.

142 Cong. Rec. S3379 (April 16, 1996) (emphasis added).

A. Congress Intended to Limit Relief Based on "New Facts" Claims That Do Not Relate to Actual Innocence.

In striking the balance invited by *Lonchar* and accomplished by AEDPA, Congress specifically addressed second or successive habeas petitions to the lower federal courts that are based on alleged new facts. To limit such challenges to convictions and sentences, Congress amended the statutory habeas provisions to state:

> (2) A claim presented in a *second or successive habeas corpus application* under section 2254 that was not presented in a prior application *shall be dismissed unless*—
>
> . . . .
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) *the facts underlying the claim*, if proven and viewed in light of the evidence as a whole, would be sufficient to *establish* by clear and convincing evidence that, but for constitutional error, *no reasonable factfinder would have found the applicant guilty* of the underlying offense.[15]

28 U.S.C. § 2244(b)(2)(B) (emphases added).[16]

While Congress did not preclude review of successive federal claims by this Court through the original writ, *see Felker v. Turpin*, 518 U.S. 651, 664-65 (1996), or via certiorari after review by state courts under 28 U.S.C. § 1257, Congress did preclude by statute the power of the lower federal courts to grant relief on successive challenges to sentences based on "new facts" that do not demonstrate actual innocence. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (stating that "the power to award the writ by any of the courts of the United States, must be given by written law"); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (recognizing "AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence"). So written, § 2244(b)(2)(B) represents the "balancing of interests under-

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[15] As one of Nelson's own lawyers has correctly summarized, prior to AEDPA's amendment of § 2244, "any type of claim that was unavailable at the time of the earlier filing—because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner—was an appropriate candidate for inclusion in a successive petition." Stevenson, *supra*, n.11, at 736. "AEDPA's successive petition standard appears to incorporate this general approach, with one major difference." *Id.* at 737. "Subsection 2244(b)(2)(B)(ii) sharply diverges from prior law . . . by modifying the 'new facts' category to include an additional requirement that the petitioner make a showing of 'innocence.'" *Id.* at 737-38.

[16] Section 2244(b)(2)(A) provides that a second or successive habeas petition may also be based on a "new rule of constitutional law," but Petitioner does not assert such a rule is applicable to this case.

taken by Congress . . . which courts may not undermine through the exercise of background equitable powers." *Lonchar*, 517 U.S. at 327. In upholding AEDPA in *Felker*, 518 U.S. at 664, this Court again specifically recognized "that judgments about the proper scope of the writ are normally for Congress to make.'" (quoting *Lonchar*, 517 U.S. at 323).

Petitioner, who has previously filed two habeas petitions with the federal courts, belatedly challenged the lethal injection procedure adopted in 2002. While the procedure is a new fact, it raises no issue as to Nelson's actual guilt of the 1978 murder of Wilson Thompson, as his counsel has admitted. App. 70. Section 2244 thus commands that the claim "shall be dismissed."

B. Allowing State Inmates to Evade Congress' Limitation on Successive Challenges to Sentences Based on Labels Would Undermine Congress' Constitutional Power.

As did the prisoners in *Preiser*, 411 U.S. at 489-90, and *Gomez*, 503 U.S. at 653–54, Petitioner seeks to avoid the limitation on his latest challenge to his sentence by labeling it a "§ 1983 claim." As this Court recognized prior to Congress' enactment of AEDPA:

> *It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings.*

Preiser, 411 U.S. at 489-90 (emphasis added).

Moreover, the delay Petitioner has accomplished is not fourteen, eighteen, or twenty years, but over twenty-five years. This is not his first or second challenge to his conviction or sentence in federal court, but his third. *See Nelson*, 292 F.3d at 1294; *Nelson*, 995 F.2d at 1549. This "new facts" claim does not challenge Petitioner's actual guilt of his third murder, but only that his choice of lethal injection might

require, unremarkably, an injection under a method recognized by standard medical textbooks, accomplished with anesthetic, and used on a President of the United States and on newborn infants over the last forty years.[17] This is precisely the type of claim that Congress sought to bar by enacting AEDPA and by so providing in the plain text of § 2244.

Allowing state prisoners to evade the specific limitation set forth in § 2244 by putting a "§ 1983" label on their claims would undermine the power of Congress to establish and to limit the jurisdiction of the lower federal courts. This Court should defer to the balance that Congress struck between providing redundant federal review to state capital defendants, on the one hand, and showing comity to the States and providing finality and peace to the victims' families, on the other.

CONCLUSION

For these reasons and those contained in Respondents' brief, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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March 3, 2004

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[17] *See* Warren Commission Report, *supra* note 10, at 929; Clinical Procedures in Emergency Medicine, *supra* note 10, at 350; Vascular Access: Principles and Practice, *supra* note 9, at 251–52; Journal of Pediatric Surgery, *supra* note 9, at 343.

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No. 03-6821

In The Supreme Court Of The United States

DAVID L. NELSON, *Petitioner*,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF OHIO AND 29 OTHER STATES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced prisoner, who seeks to stay his execution in order to pursue a challenge to the procedure for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

STATEMENT OF INTEREST OF AMICI CURIAE

The *practical* question presented in this case—whether a death-sentenced prisoner may obtain a stay of execution by filing a complaint under 28 U.S.C. § 1983, after his conviction and sentence have been upheld by the state and federal courts—is of vital importance to the States. It is difficult to imagine an interest of the State more compelling than the enforcement of its criminal judgments. "[T]he power of the State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Moreover, this Court has long recognized the "greater threat" to the State's interests in finality posed by second or successive habeas corpus actions, which "are less likely to lead to discovery of unconstitutional punishments." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). "Only with an assurance of real finality can the State execute its moral judgment in a case[,] [o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out[,] [and] [t]o unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victim of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (internal citations and quotations omitted).

Recognizing this compelling interest in finality, as well as the significant costs of habeas corpus review in general, Congress in 1996 enacted stringent restrictions on the filing of second or successive applications for habeas corpus relief. Congress acted with the specific purpose of eliminating unwarranted interference in the States' enforcement of capital sentences, and specifically intended to strengthen and extend this Court's protections of the States' interest in the finality of their criminal judgments. Many years previously, this Court held in *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973), that it "would wholly frustrate

explicit congressional intent" if prisoners attacking the fact or duration of their confinement could avoid having to exhaust their state remedies—a requisite to the specific remedy of habeas corpus—"by the simple expedient of putting a different label on their pleadings." A like concern looms large here. The States' interest in the finality of their judgments in capital cases, and Congress's efforts to protect those interests, will be wholly frustrated if a death-sentenced prisoner can avoid the restrictions on repeated habeas corpus actions and obtain a stay of execution simply by labeling his pleading a "§ 1983 complaint." Further, as a practical matter, an exception for "method of execution" claims would swallow the restrictions on second or successive petitions and result in a new "last round" of litigation for *all* death-sentenced prisoners.

The *amici* States all share an interest in ensuring that their capital sentencing schemes remain viable. As a practical matter, this must include appropriate limitations on the scope of eleventh-hour federal litigation in the face of an imminent execution. Accordingly, the *amici* States respectfully request that this Court recognize the States' strong interest in finality, and uphold the plain language of the statutory framework Congress created, and the intent reflected in that language, by affirming the judgment below.

SUMMARY OF ARGUMENT

A death-sentenced prisoner's complaint that challenges the State's execution procedures, and seeks an injunction, directly interferes with the State's execution of its judgment; it is just as close, if not closer, to the core of habeas corpus as a complaint by an imprisoned inmate who seeks speedier release from an otherwise lawfully adjudged sentence. Indeed, such a challenge is the very essence of a collateral attack, as it seeks to deprive the State's judgment of its normal force and effect. Thus, not surprisingly, federal

courts have routinely recognized that challenges to execution procedures fall squarely within the traditional scope of federal habeas corpus.

Nelson cannot alter this result by merely relabeling his challenge as a § 1983 claim. In enacting AEDPA, and its limitations on second or successive habeas petitions, Congress intended to modify and strengthen this Court's abuse of the writ doctrine. And, even pre-AEDPA, this Court had repeatedly recognized that this doctrine applied to second or successive requests for stays of execution, regardless of whether the requested stays are labeled as § 1983 complaints. Permitting a death-sentenced prisoner to avoid Congress's subsequently enacted restrictions and obtain a stay of execution would wholly frustrate Congressional intent.

Indeed, the policy reasons underlying the habeas corpus statutes require that complaints filed by prisoners like Nelson, who seek to enjoin their executions, should *always* be subject to the statutory provisions governing second or successive habeas corpus petitions. Nelson essentially argues that if the prisoner can show that he was precluded by circumstances beyond his control from presenting his claim in a previous habeas corpus petition, the Court should allow a complaint under § 1983, or judicially exempt him from the statutory restrictions on second or successive petitions. But such exceptions surely would swallow the rules, and would severely damage the States' interest in the finality of their judgments in capital cases. No matter how slim the possibility of obtaining a stay, death-sentenced prisoners will have every incentive to delay their challenges to the State's method of execution until the final days before their execution is set to occur. Faced with these last-minute claims, courts may well conclude that no matter how facially meritless the complaint appears, they cannot possibly dismiss the complaint in the short time afforded by the prisoner's

dilatory filing. Congress surely had this in mind when it enacted the second or successive petition rules.

Moreover, contrary to Nelson's arguments, application of the second or successive petition rules "across the board" will not result in any fundamental unfairness. Most, if not all, challenges to a State's method of execution will "ripen" long before there would be any need for a prisoner to seek a stay of execution in order to litigate his claim. Certainly here, Nelson's specific complaint—that he will be "tortured" by his executioners' attempt to access his veins—is hardly novel or unique. Nearly twenty years ago, death-row prisoners argued to the federal courts that the "dangers" of intravenous injection—including difficulties in achieving effective venous access due to physical abnormalities—required the Food and Drug Administration to exercise jurisdiction over the use of lethal injection to execute condemned prisoners. Alabama made lethal injection its sole method of execution over a year before Nelson brought suit seeking, at the last minute, to delay his execution. And, as Nelson himself admits, he has long been aware of his "seriously compromised" veins.

At bottom, Nelson's real claim is that he has an absolute right to a federal district court forum in which to present his constitutional claims, no matter how late in the process he makes them. This Court has long recognized, however, that no such requirement exists. State courts provide a perfectly adequate vehicle for vindicating constitutional rights, and Nelson has such avenues open to him here. Even were that not the case, he could still seek to press his concerns before the State officials overseeing his execution, or, if necessary, even through an original writ in this Court. There is simply no need, nor any good reason, for this Court to ignore both precedent and Congressional intent in order to provide a federal district court forum for Nelson's efforts to delay execution of his sentence. In fact, doing so

would severely undercut the States' strong interest in the finality of their criminal judgments, and the viability of their capital sentencing regimes.

The States, therefore, respectfully request this Court to affirm the Eleventh Circuit's decision below.

ARGUMENT

I. A Complaint Like Nelson's, Which Seeks A Stay Of Execution And Challenges Execution Procedures, Must Be Treated As A Petition For A Writ Of Habeas Corpus, Subject To The Statutory Restrictions On Second Or Successive Petitions.

This Court has held that where a state prisoner's claim of constitutional error meets the language of both § 1983 and the federal habeas corpus statutes, Congress intended habeas corpus to be the prisoner's exclusive remedy. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). Like a prisoner who challenges a sentence of imprisonment, a death-sentenced prisoner who seeks to stay his execution via a "§ 1983 complaint" should be subject to the rules of habeas corpus, as the prisoner seeks to directly interfere with the State's execution of his death sentence. Indeed, such a complaint is the very definition of a collateral attack in habeas corpus, *i.e.*, it seeks on constitutional grounds to deprive the State's judgment of its normal force and effect. Moreover, federal courts have routinely recognized that challenges to execution procedures fall squarely within the traditional scope of federal habeas corpus. And, in amending the habeas corpus statutes, Congress clearly intended to subject requests for stays of execution to the limitations for second or successive habeas petitions. Accordingly, this Court should hold that requests for a stay of execution after a prisoner's initial request for habeas corpus relief are subject to the limitations on second or successive petitions,

notwithstanding the prisoner's attempt to denominate the request a "§ 1983 complaint."

A. Where the immediate relief a prisoner seeks is a stay of execution, a complaint under § 1983 is the "functional equivalent" of a habeas petition.

As an initial matter, the federal district court should have summarily dismissed Nelson's complaint since the relief he requested—a stay of execution—cannot be granted pursuant to 42 U.S.C. § 1983. The Court's decision in *Preiser*, clearly establishes that even where a prisoner's claim falls within "the literal applicability of [§ 1983's] terms," the specific federal habeas corpus statute is the *exclusive* remedy where it "clearly applies." *Preiser*, 411 U.S. at 489. And, federal habeas corpus "clearly applies" to challenges directed toward overturning a prisoner's conviction or sentence. A claim seeking a stay of execution attempts to directly thwart the State's ability to carry out a prisoner's sentence as much as—if not more than—the type of claim at issue in *Preiser*, *i.e.*, a claim seeking earlier release. Thus, under *Preiser*, prisoners cannot use § 1983 to seek a stay of execution, whatever the basis for their claim. Rather habeas corpus, with its attendant limitations, is their exclusive remedy.

This Court has repeatedly recognized that certain prisoner claims may fall both within the language of § 1983 and the traditional scope of habeas. *See, e.g., Preiser* 411 U.S. at 489; *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Preiser*, for instance, the prisoners alleged that State officials had acted unconstitutionally in depriving the prisoners of good time credits. The claim seemed to meet both the literal terms of § 1983—which provides a remedy against unconstitutional conduct by those acting under color of State law—and traditional habeas—since it sought earlier release

from confinement. The Court, however, explicitly rejected the notion that in such situations both vehicles would be open to the prisoner. In limiting the prisoners to pursuing their claims in habeas, the Court noted, in language directly applicable here, that, "[i]t would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [habeas requirements] by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-90.

The Court reached this result despite the prisoners' argument that, because they were merely challenging the cancellation of credits towards their sentences awarded for good behavior, they were not directly seeking to overturn the underlying state court criminal judgments. According to the Court, this challenge to their sentence was "just as close to the core of habeas corpus" as a direct challenge to the conviction itself. *Id.* at 489.

Although *Preiser* concerned prisoners sentenced to imprisonment, its reasoning applies equally—perhaps even more strongly—to a death-sentenced prisoner who seeks to enjoin his execution. The death-sentenced prisoner, *by definition*, is collaterally attacking his sentence, as "he [seeks] to deprive [the state's judgment] of [its] normal force and effect in a proceeding that [has] an independent purpose other than to overturn the prior judgments." *Parke v. Raley*, 506 U.S. 20, 30 (1992). The injunctive relief requested by the death-sentenced prisoner certainly is *closer* to the "core" of habeas corpus than the earlier release sought by the imprisoned inmate, who presents at most an *indirect* challenge to his sentence. As the Fifth Circuit has noted, "a request for a stay of execution entails a potential federal interference with state penal interests that is equivalent to, if not greater than, the request for immediate release (or speedier release) from prison that was at issue in *Preiser*." *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417,

423 (5th Cir. 2002). As such, as the Sixth Circuit has held, a "challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus." *In re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997).

In light of the clear implication of this Court's precedent, it is not at all surprising that several circuits have unequivocally held that "[f]ederal courts lack jurisdiction to stay executions under § 1983." *See Moody v. Rodriguez*, 164 F.3d 893 (5th Cir. 1999). *See also Faulder v. Johnson*, 178 F.3d 741 (5th Cir. 1999); *Sapp*, 118 F.3d at 463-64; *Williams v. Hopkins*, 130 F.3d 333, 336 (8th Cir. 1997); *Gilreath v. Ray*, 273 F.3d 932, 933 (11th Cir. 2001). In *Spivey v. Ray*, 279 F.3d 1301 (11th Cir. 2002), for instance, the Eleventh Circuit determined that the district court properly denied Spivey's motion for a stay of execution filed in connection with a claim purportedly brought under § 1983. *Id.* at 1302. Recognizing that Spivey's motion for a stay of execution was properly characterized as a habeas corpus claim, the Court held that "any other relief [he] sought is intertwined with and merely incidental to his effort to gain a stay of execution;" and, accordingly, "*his claim necessarily implies a challenge to the imposition of his sentence*, and thus must be deemed a habeas corpus claim seeking a stay of execution" rather than a § 1983 claim. *Id.* at 1302 n.1 (quoting *Gilreath*, 273 F.3d at 935) (emphasis added).

Echoing the Eleventh Circuit's rationale, the Fifth Circuit in *Faulder* noted that the "essence of Faulder's last-minute request for relief in the district court and this court is an attempt ultimately to obtain an injunction against the death sentence lawfully imposed upon him by the state of Texas." *Faulder*, 178 F.3d at 742. As such, Faulder was "asking the federal courts to interfere with the state's carrying out of the death penalty," which, the Fifth Circuit noted, is "tantamount to seeking 'a remedy available to effect

discharge from any confinement contrary to the Constitution or fundamental law.'" *Id.* (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973)). As noted above, however, this Court in *Preiser* held that for such challenges, the "*sole federal remedy is a writ of habeas corpus.*" *Preiser*, 411 U.S. at 500 (emphasis added). Accordingly, these circuits have correctly held that inmates' "exclusive, appropriate" avenue for seeking a stay of execution was "a writ of habeas corpus" rather than § 1983 (*Faulder*, 178 F.3d at 742); and, thus, the district courts in each of these cases should have "denied [the inmates'] motion for stay of execution" under § 1983. *Spivey*, 279 F.3d at 1304.

In seeking a stay of execution, Nelson is directly challenging the State's ability to carry out its sentence. He simply cannot use § 1983 to obtain such relief. Accordingly, the district court properly denied his request.

B. Challenges to execution procedures must be treated as habeas corpus claims, regardless of the label the prisoner puts on them.

Not long after this Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), one commentator predicted that "a wave of cases examining the legality of the traditional modes of execution cannot be far away." Martin R. Gardner, *Execution and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio St. L. J. 96, 97 (1978). The predicted wave indeed materialized, and the examinations were conducted in federal court via petitions for habeas corpus relief. *See, e.g., Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (electrocution); *McCorquodale v. Balkcom*, 525 F. Supp. 408 (N.D. Ga. 1981) (electrocution); *Mitchell v. Hopper*, 538 F. Supp. 77 (S.D. Ga. 1982) (electrocution); *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983) (gas); *Sullivan v. Dugger*, 721 F.2d 719 (11th Cir. 1983) (electrocution); *Dix v. Newsome*, 584 F.

Supp. 1052 (N.D. Ga. 1984) (electrocution); *Woolls v. McCotter*, 798 F.2d 695 (5th Cir. 1986) (lethal injection); *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986) (firing squad); *United States ex rel. Silagy v. Peters*, 713 F. Supp. 1246 (C.D. Ill. 1989) (lethal injection); *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992) (lethal injection); *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (hanging); *Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994) (hanging); *Hunt v. Smith*, 856 F. Supp. 251 (D. Md. 1994) (gas); *Gerlaugh v. Lewis*, 898 F. Supp. 1388 (D. Ariz. 1995) (gas); *Gattis v. Snyder*, 46 F. Supp. 2d 344 (D. Del. 1999) (lethal injection); *Wallace v. Davis*, 2002 U.S. Dist. Lexis 22353 (S.D. Ind. 2002) (lethal injection).

In light of this litany of cases, there can be little doubt that Eighth Amendment challenges to execution procedures fall "squarely within [the] traditional scope of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. at 487. And, as discussed below (see Sec. II.B.), the fact that Nelson has tried to "personalize" his claims by arguing that there are unique difficulties with the process as applied to him, does nothing to change this result.

C. Congress clearly intended that the restrictions on second or successive petitions should apply to requests for stays of execution, regardless of how they are denominated.

The AEDPA's restrictions on second or successive petitions address what this Court often has described as "abuse of the writ." The abuse of the writ doctrine is "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," designed "to vindicate the State's interest in the finality of its criminal judgments." *McCleskey v. Zant*, 499 U.S. 467, 489, 493 (1991). Under pre-AEDPA

precedents, the "equitable rationale" underlying the abuse of the writ doctrine—"avoiding, among other things, 'last-minute attempts to manipulate the judicial process'"—applied "to a suit challenging the method of execution, *regardless of the technical form of action.*" *Lonchar v. Thomas*, 517 U.S. 314, 329 (1996) (*citing Gomez v. United States Dist. Court for the Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992)) (emphasis added). In *Gomez*, the Court vacated a stay of the execution of Robert Alton Harris, who had presented an eleventh hour challenge to execution by lethal gas in a complaint under § 1983. In doing so, the Court described Harris' § 1983 action "as an obvious attempt to avoid the application of *McCleskey v. Zant*." 503 U.S. at 653. The same is true here.

"This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence." *Schlup v. Delo*, 513 U.S. 298, 319, n. 35 (1995). Congress clearly intended to modify and strengthen this Court's "abuse of the writ doctrine," and to apply the newly enacted restrictions to *all* death-sentenced prisoners who seek stays of execution after completion of their initial round of habeas corpus litigation, regardless of whether the stays are requested under § 1983. To argue otherwise is to suggest that Congress was unaware of this Court's decision in *Gomez*, or that Congress was satisfied with the existing restrictions on abusive filings in capital cases. Both suggestions are demonstrably untenable. *See Symposium: Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 Fla. St. U.L. Rev. 133 (Summer, 1992) (noting that cases like Harris' "have fueled the anti-habeas fire"); *Retrospective Forum: The Robert Alton Harris Execution: Public Policy Lessons from the Robert Alton Harris Case*, 40 U.C.L.A. L. Rev. 295, December, 1992 (arguing that *Harris* case demonstrated the need for Congressional reform); *Felker v. Turpin*, 518 U.S. 651, 664

(1996) ("The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners.").

In sum, it is clear that Congress intended the restrictions on second or successive petitions to apply to stays of execution requested under § 1983.

II. The Policy Reasons Underlying The Habeas Corpus Statute Strongly Counsel Against Recognizing Special Exceptions To Statutory Habeas Restrictions For Those Prisoners Seeking Stays Of Execution.

Nelson implicitly concedes the obvious—that challenges to the State's method of execution, for all practical intents and purposes, fit into the habeas corpus mold. However, he essentially argues that if the prisoner can show that he was precluded by circumstances beyond his control from presenting his claim in a previous habeas corpus petition, the Court should allow a complaint under § 1983, or judicially exempt the prisoner from the statutory restrictions on second or successive petitions. "The policy reasons underlying the habeas corpus statute," *Preiser*, 411 U.S. at 490, however, counsel decisively against such an override of Congress's clear intent, especially in the context of stay requests. If there is *any* way around the second petition restrictions on obtaining a stay of execution, every death-sentenced prisoner will seek it out. The States' interest in the finality of their judgments in capital cases will thereby be severely harmed.

Moreover, that harm is neither dictated by the interests of fundamental fairness nor necessary as a practical matter. Virtually all "method of execution" claims will be "ripe" at some point well in advance of the execution date. Nelson, for instance, has known for two decades about his

compromised veins, and for over a year that lethal injection was the sole means of execution. Whether or not, as a general matter, there should be an exception to second habeas rules for newly-arisen execution method claims that are presented well in advance of execution, there surely should be no such exception for prisoners seeking eleventh-hour stays, especially not where, as here, Nelson could have advanced his claim long before he did.

A. Recognizing the exception Nelson requests would severely undermine the States' important interest in the finality of their criminal judgments.

In the event that any exceptions to the second petition rules are recognized, the States have good reason to fear that all death-sentenced prisoners will assert eleventh-hour "method of execution" challenges in a last-minute attempt to delay their execution. As noted in Respondent's Brief, in the wake of this Court's grant of Nelson's certiorari petition, a number of death-sentenced prisoners presented "method of execution" claims in what were nominally denominated as § 1983 complaints. *See Robinson v. Crosby*, No. 03A653, 540 U.S. __ (Feb. 4, 2004); *Roe v. Taft*, No. 03A650, 540 U.S. ___ (Feb. 2, 2004); *Zimmerman v. Johnson*, No. 03A606, 540 U.S. __ (Jan. 21, 2004); *Bruce v. Dretke*, No. 03A554, 540 U.S. ___ (Jan. 14, 2004); *Williams v. Taft*, No. 03A590, 540 U.S. ___ (Jan. 13, 2004); *Ward v. Darks*, No. 03A584, 540 U.S. ___ (Jan. 13, 2004); *Beck v. Rowsey*, No. 03A576, 540 U.S. ___ (Jan. 8, 2004); *Zimmerman v. Johnson*, No. 03A497, 540 U.S. ___ (Dec. 15, 2003); *Cooper v. Rimmer*, No. 04-99001, 2004 U.S. App. Lexis 2071 (9th Cir. 2004). Quite obviously, the prisoners sought to liken their cases to Nelson's case, and it is fair to say that their eleventh-hour complaints were not necessitated by any unforeseen circumstances, but rather by this Court's grant of Nelson's petition and the stay of Nelson's execution.

Although these prisoners were not successful, should the Court ultimately accept Nelson's arguments that prisoners can escape second petition restrictions on seeking stays of execution merely by the expediency of claiming that their method of execution claims were previously "unripe" or "premature," it is reasonable to assume that virtually all future death-sentenced prisoners will be citing the "*Nelson* exception" as grounds for eleventh-hour stays. No matter how carefully the Court crafts these exceptions, death-row prisoners will argue that their requests for stays must be granted, because this Court has "held" that challenges to the method of execution are not "ripe" until the executions are imminent, just as Nelson cites *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), for the "holding" that claims "premature and unfit for adjudication until just before the execution is carried out" are not subject to the second petition rules. *See* Pet. Br. at 15. Of course, this Court announced no such general rule in *Stewart*. Rather, the Court noted specifically that *Stewart* did *not* present the situation where a prisoner raises a claim "for the first time in a petition after the federal courts have already rejected the prisoner's initial habeas application," and that, therefore, the Court had "no occasion to decide whether such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." 523 U.S. at 645. But that merely illustrates the point—those facing imminent execution have every incentive to aggressively characterize (or even mischaracterize) precedent in order to advance their claims.

In light of the practical realities of death penalty litigation, there is little question that the "ordinary principles governing stays" must "be revised to account for an attempt by a petitioner to manipulate the district court into granting relief where relief is clearly precluded." *Lonchar*, 517 U.S. at 336-37 (Rehnquist, C.J., concurring in the judgment). Congress clearly had this reality in mind when it required

petitioners to request permission to initiate second or successive rounds of habeas corpus litigation at the court of appeals level; required decision on the request by a three judge panel; and prohibited the panel's decision from being subject to petitions for rehearing or certiorari. *See* 28 U.S.C. § 2244(b)(3). Should this Court recognize exceptions to the second petition rules for "method of execution claims," the death-sentenced prisoner undoubtedly will argue that it is wholly appropriate to begin by asking the district court for a stay, and to insist on full and careful review should the district court deny the complaint on its "merits" and refuse to grant a stay. The district court and/or the court of appeals may feel compelled to grant the stay, concluding there is insufficient time to dismiss the case on the "merits," or the court of appeals may hesitate to vacate a stay issued by the district court.

The States do not suggest that every death-sentenced prisoner will succeed in maneuvering a stay in this way, should the Court recognize exceptions to the statutory second petition restrictions. However, the States believe in good faith that should this Court craft exceptions to the second petition rules, stays will be issued with sufficient frequency to encourage all death-sentenced prisoners to make the effort, even though all of the prisoners' complaints ultimately will be deemed without merit. Indeed, this Court recently vacated several stays issued by lower courts, stays apparently entered solely on the mistaken belief that the Court's grant of certiorari review in this case mandated them. The frequency of such unwarranted interferences with execution of the States' judgments, notwithstanding this Court's abuse of the writ doctrine, is what prompted the Congressional reforms in the first place. The end result of exceptions to Congress's clear intentions could be a new "last round" of federal litigation in capital cases that will seriously harm the States' interest in finality.

B. There is nothing new or unique about claims by death-sentenced prisoners that due to their physical condition or other unanticipated circumstances their executions could result in unacceptable pain.

Nelson's demand for an exception to normal habeas practice should be denied for another reason as well—the claim that he is asserting is neither unique, nor recently discovered. The potential difficulties of intravenous injection as a method of execution, including the problems obtaining effective venous access may pose, were raised by death-sentenced prisoners long before Nelson claimed that the method the State may potentially use here for obtaining access could result in an "unexpectedly torturous and needlessly painful" execution. *See* Pet. Br. at 17. Moreover, as Nelson admits in his own brief, he has been aware of his compromised veins, and the problems they present, for years. *Id.* at 5. And lethal injection had been the sole method of execution in Alabama for over a year before Nelson first brought his claim. Thus, there was no reason for him to stall until the final days before his scheduled execution in bringing his claim.

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court considered the claim of several death-row prisoners that the Food and Drug Administration was required to use its enforcement power to ensure that the States only use "safe and effective drugs" for their execution. The court of appeals ruled in the prisoner's favor. According to an amicus brief filed in their support, the prisoners claimed that "the technique of intravenous injection is fraught with dangers;" that it "is extremely difficult, if not impossible, to give lethal injections to persons with certain common physical conditions and abnormalities;" that "even people without abnormalities experience some constriction of the veins in

anticipation of intravenous injections;" and it "is expected that prisoners facing execution will manifest similar reactions, magnifying the difficulty of achieving effective venipuncture." *Heckler v. Chaney*, 1983 U.S. Briefs 1878 (September 29, 1984). *See also Woolls v. McCotter*, 798 F.2d 695, 697 (5th Cir. 1986) (rejecting claim that lethal injection was unconstitutional because FDA refused to determine whether lethal injection quickly and effectively causes a painless death). In short, concerns about effective venous access during lethal injection are hardly novel.

Nor can Nelson make his claim "unique" merely by asserting that obtaining access to *his* veins will present more difficulties or more potential for pain. Providing special exceptions to habeas requirements for prisoners who "personalize" their challenges to execution procedures would undoubtedly open the floodgates to a whole range of other claimed "physical abnormalities." For example, a prisoner may claim that the dosage level of the lethal chemicals is too high or too low for a person of his weight (and, of course, because weight fluctuates, the prisoner would claim the right to wait until execution is imminent to advance the claim); or that previous use of illegal drugs has increased his tolerances for the lethal chemicals; or that he has newly discovered that he is allergic to the chemical that is intended to render him unconscious. Further, as a conceptual matter, there is no reason that the exceptions Nelson proposes for handling "unanticipated" events should be limited to claims of physical abnormalities, such as the "bad veins" claim he presents here. A prisoner could claim that there is an unacceptable risk that the food consumed before the execution will reduce the effectiveness of the sedating drug; or that there are insufficient contingency plans in the event that the intravenous injection is interrupted by equipment failures.

In short, the factual and legal bases for claims like Nelson's are not so novel or unusual that the Court should ignore clear Congressional intent and create exceptions to the normal rules of habeas corpus for prisoners seeking to stay their executions. Doing so would create the potential for endless manipulation by death row inmates facing imminent execution.

That the Court should not struggle to manufacture an exception here is especially true in light of the record with regard to Nelson's "bad veins" claim. As Nelson himself admits, he has long been aware of his "severely compromised veins." *See* Pet. Br. at 5. In fact, by his own admission, he "has encountered repeated problems *over the last two decades* with prison medical personnel gaining venous access during routine physical examination." *Id.* (emphasis added). And he knew for over a year prior to advancing his claim that the State's intended method of execution would require venous access; Alabama made lethal injection the sole means of execution on July 1, 2002. His failure to advance a claim before now exposes his suit for what it is, a transparent attempt to forestall execution of Alabama's criminal judgment against him. There is no good reason for this Court to reward those efforts.

III. Prisoners Challenging Execution Procedures Have Sufficient Avenues, At Both The State And Federal Level, To Pursue Their Constitutional Claims.

At root, Nelson's claim is that the Constitution requires he have access to a *federal* forum in which to present his Eighth Amendment claim, (*see, e.g.*, Pet. Br. at 19-24), a right that he asserts "goes to the heart of due process." *Id.* at 21. That claim, however, fails for at least two reasons. First, this Court has long recognized that the state court system is a perfectly adequate vehicle for

vindicating federal constitutional claims, and here Nelson had viable avenues of such relief available in that forum. Second, even if a federal forum were necessary, Nelson had two: (a) he could have pursued an original writ in this Court; or (b) he could have sought certiorari review of the state court's disposition of his federal claim.

As this Court has noted, "state courts are just as able as federal courts to adjudicate [federal claims]." *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 826 (1990). *See also Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507 (1962) ("nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law"). Indeed, in the habeas corpus context, the very context presented here, this Court has explicitly considered, *and rejected*, the notion that Nelson advances—that state prisoners must have access to a federal forum in which to press their federal constitutional claims. *See Stone v. Powell*, 428 U.S. 465 (1976). In *Stone*, the Court barred state prisoners from presenting Fourth Amendment claims on habeas, so long as they had had an opportunity to fully and fairly litigate that claim in state court. In language directly responsive to the Nelson's argument that he is entitled to a federal forum here, the Court stated:

> The policy arguments that [the state prisoners] marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate

> safeguard. ... Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. ... In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [federal law] than his neighbor in the state courthouse."

Stone, 438 U.S. at 493 n. 35, (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harvard Rev. 441, 509 (1963)). Just so here.

In essence, Nelson is attempting to resurrect the theory this Court expressly rejected in *Allen v. McCurry*, 449 U.S. 90 (1980), that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* at 103. It is just as true today, however, as it was when *Allen* was decided, that this theory finds no support "in either the Constitution" or "in §1983 itself." *Id.* at 103-04.

Indeed, if anything, changes in the law demonstrate lesser, not greater, entitlement to a federal forum. In particular, in enacting AEDPA, Congress *rejected* the argument that Nelson presses here, that a state prisoner must have a federal forum in which to present his federal claims.

Under AEDPA, a federal court can grant habeas relief *only where* the state court judgment violates clearly established federal law as determined by this Court's precedent. *See* 28 U.S.C. § 2244; *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Errors in federal law that do not rise to that level may not be heard in federal court. *Id.* at 412 (noting that "§ 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court"). That is, Congress explicitly and unequivocally foreclosed habeas review for certain types of federal law claims. In short, Nelson simply cannot maintain that "due process" requires that he have a federal forum in which "to present his Eighth Amendment claims of needless cruelty." Pet. Br. at 23.

And, as Respondent points out in its brief, Nelson had (and still has) ample opportunity to present his claim to Alabama's *State* courts. Resp. Br. at 45-48. Moreover, there is no reason to believe that similarly-situated prisoners in other States will find the doors to state court closed when they seek relief. The States offer a variety of state court mechanisms through which a prisoner could present the constitutional concerns that Nelson claims here.[1] Indeed,

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[1] Other States have similar regimes employing multiple ways by which inmates may have claims heard without regard to timeliness or successive petition bars. Three with regimes that are comparable to the one employed by the State of Alabama are those in Nebraska, Tennessee, and Washington. *See, e.g.*, Nebraska: NEB. REV. STAT. §§ 29-3001, ET SEQ. (2003) (state post-conviction remedy without a time bar allowing any claim that could not have been raised earlier), Neb. Rev. Stat. § 83-1,132 (2003) (granting an automatic stay of execution upon application for commutation of sentence), NEB. S. CT. R. 6.C(2); Tennessee: TENN. CODE ANN. § 4-5-223 to -225 (2003) (providing for declaratory judgment actions of state agency, e.g., the policies of the Tennessee Department of Corrections's policies for administering lethal injection), TENN. S. CT. R. 12.4 (setting forth detailed procedures for the setting and objection to execution dates in the Supreme Court of Tennessee); Washington: WASH. REV. CODE § 10.73.100 (2003) (exempting claims that depend on newly discovered evidence from the one-year statute of limitations for personal restraint petitions), WASH. REV. CODE § 10.73.140 (2003) (exempting new claims filed in successive petitions provided

States must have such avenues available, as challenges to the methods of execution have been frequently raised and reviewed in federal habeas corpus. *See* Section I.B. above (citing cases). Presumably, the prisoners in those cases were able to exhaust their claims before the state courts. In light of these available state court options, Nelson's claim that due process requires a federal forum must fail.

Moreover, even if state courts were not available, state executive officials provide yet another check against unconstitutional conduct during the course of the execution. This Court should not assume that the state officials would merely ignore constitutional guarantees. As this Court noted in *Alden v. Maine*, 527 U.S. 706, 755 (1999):

> The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the Unites States. The good faith of the States thus provides an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."

Here, however, entry of a stay would require just the type of assumption this Court cautioned against in *Alden*. Prison officials, as well as Alabama's Governor, are well aware of the constitutional prohibitions against cruel and unusual punishment. Should it appear that the procedure is becoming

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"that [the inmate] has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition"), WASH. R. APP. P. 16.2 -.27 (detailing procedural safeguards entitled to inmates pursuing a personal restraint petition).

"intolerably painful and dangerous" as Nelson alleges (*see* Pet. Br. at 10), state officials will have ample opportunity to stop the process and address any problems. Indeed, state officials are already demonstrating their respect for the constitutional concerns Nelson raises here—they have repeatedly indicated that they will use the least invasive and painful method that they can to obtain venous access, that they will use a "cut down" only if absolutely necessary, and that, should it prove necessary, every effort will be made to ensure Nelson's comfort during the procedure. Their "good faith" adherence to the Constitution in executing their duties provides yet additional protection against constitutional violations during the execution process.

Finally, even if the Constitution did mandate a federal forum for vindicating federal claims, and it does not, two such avenues are available here. First, Nelson could seek certiorari review of the state court disposition of his federal claims, thus exposing the state court decision to the "oversight jurisdiction" of this Court. *See Stone*, 428 U.S. at 493, n. 35. This "oversight jurisdiction" ensures that the Court will have the opportunity to police the appropriate scope of any impacted constitutional guarantees. Second, as the Court recognized in *Felker v. Turpin*, a prisoner may petition this Court for an original writ of habeas corpus. 518 U.S. at 664. In sum, Nelson is not without available avenues of relief, both State and federal. Accordingly, there is no need, nor any reason, for this Court to upset settled precedent in order to allow Nelson's claim to proceed in federal d strict court.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eleventh Circuit.

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